No. 89-1028-CFX
Status: GRANTED

Title: CSX Transportation, Inc., Petitioner
v.
Brotherhood of Railway Carmen, et al.

Docketed:
December 28, 1989

Court: United States Court of Appeals for the District of Columbia Circuit

Vide:
89-1027

Counsel for petitioner: Whitehead,James S., Phillips,Carter G.

Counsel for respondent: Mahoney,William G., Solicitor General

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Dec 28 1989 | G | Petition for writ of certiorari filed. |
| 2 | Dec 28 1989 | | Appendix of petitioner filed. |
| 3 | Jan 29 1990 | | Brief amicus curiae of National Railway Labor Conference filed. VIDED. |
| 5 | Feb 6 1990 | | Order extending time to file response to petition until February 28, 1990. |
| 6 | Feb 6 1990 | | The above extension is for all respondents. |
| 9 | Feb 6 1990 | | Brief of respondent United States in opposition filed. VIDED. |
| 7 | Feb 27 1990 | | Brief of respondents Brotherhood of Railway Carmen, et al. in opposition filed. VIDED. |
| 8 | Feb 28 1990 | | DISTRIBUTED. March 16, 1990 |
| 10 | Feb 28 1990 | X | Brief amicus curiae of Consolidated Rail Corporation filed. VIDED. |
| 11 | Mar 9 1990 | X | Reply brief of petitioner CSX Transporation, Inc. filed. |
| 13 | Mar 19 1990 | | REDISTRIBUTED. March 23, 1990 |
| 14 | Mar 26 1990 | | Petition GRANTED. The case is consolidated with 89-1027, and a total of one hour is allotted for oral argument. ********** |
| 16 | Apr 30 1990 | | Order extending time to file brief of petitioner on the merits until May 25, 1990. |
| 17 | May 23 1990 | G | Motion of respondents American Train Dispatchers' Association, et al. to dismiss filed. |
| 18 | May 25 1990 | | Joint appendix filed. VIDED. |
| 19 | May 25 1990 | | Brief amicus curiae of National Railway Labor Conference filed. VIDED. |
| 20 | May 25 1990 | | Brief of respondent United States in support of petition filed. VIDED. |
| 28 | May 25 1990 | | Brief of petitioner CSX Transporation, Inc. filed. |
| 25 | May 29 1990 | | Order extending time to file brief of respondent on the merits until July 20, 1990. |
| 21 | May 31 1990 | | Application (A89-856) by respondents to file a brief on the merits in excess of page limits, submitted to The Chief Justice. |
| 22 | Jun 1 1990 | | Brief of petitioner CSX Transporation, Inc. in response to motion to dismiss filed. |
| 23 | Jun 1 1990 | | Application (A89-856) denied by the Chief Justice. |
| 27 | Jun 1 1990 | | DISTRIBUTED. JUNE 7, 1990. (MOTION TO DISMISS). |
| 26 | Jun 11 1990 | | Motion of respondents American Train Dispatchers' Association, et al. to dismiss GRANTED. is deferred for |

2pp

No. 89-1028-CFX

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| | | | 120 days. Further briefing in this case is suspended for 120 days. |
| 29 | Jun 11 1990 | G | Motion of the Acting Solicitor General for divided argument filed. |
| 35 | Jun 11 1990 | D | Motion of respondents American Train Dispatchers' Association, et al. to dismiss filed. |
| 30 | Aug 28 1990 | | Record filed. |
| | | * | Certified copy of original record and C. A. proceedings received. |
| 38 | Sep 1[illegible] 1990 | | Order extending time to file brief of respondent on the merits until November 9, 1990. |
| 31 | Sep 19 1990 | | Supplemental brief of respondents Bhd. of Railway Carmen, Inc., et al. filed. VIDED. |
| 32 | Sep 26 1990 | | DISTRIBUTED. Oct. 12, 1990. (Motion of respondents American Train Dispatchers' Association, et al., to dismiss). |
| 33 | Sep 27 1990 | X | Supplemental brief of petitioner CSX Transporation, Inc. filed. |
| 34 | Sep 28 1990 | X | Brief of respondent United States in response to the supplemental memorandum of the Union respondents in support of the motion to dismiss filed. VIDED. |
| 36 | Oct 15 1990 | | Motion of respondents American Train Dispatchers' Association, et al. to dismiss DENIED. |
| 39 | Oct 19 1990 | | SET FOR ARGUMENT MONDAY, DECEMBER 3, 1990. (4TH CASE) |
| 40 | Oct 29 1990 | | Motion of the Acting Solicitor General for divided argument GRANTED. |
| 42 | Nov 8 1990 | | CIRCULATED. |
| 41 | Nov 9 1990 | X | Brief of respondents American Train Dispatchers' Assn., et al. filed. VIDED. |
| 44 | Nov 21 1990 | X | Reply brief of petitioner United States filed. VIDED. |
| 43 | Nov 23 1990 | X | Reply brief of petitioner CSX Transporation, Inc. filed. |
| 45 | Dec 3 1990 | | ARGUED. |
| 46 | Dec 5 1990 | P | Motion of respondent Union Respondents for leave to file a supplemental brief after argument filed. |

No.

Supreme Court, U.S.
FILED
DEC 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

# In The
# Supreme Court of the United States
## October Term, 1989

**CSX TRANSPORTATION, INC.,**

*Petitioner,*

*v.*

**BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,**

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES S. WHITEHEAD
*(Counsel of Record)*
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703

NICHOLAS S. YOVANOVIC
JAMES D. TOMOLA
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

*Attorneys for Petitioner*
*CSX TRANSPORTATION, INC.*

**Date: December 27, 1989**

American Reprographics Management, Inc.™ (312) 332-2764

29 pp

## QUESTION PRESENTED

Does § 11341(a) of the Interstate Commerce Act empower the Interstate Commerce Commission to override a provision of a collective bargaining agreement where necessary to do so in order to prevent a rail consolidation found by the Commission to be in the public interest from being obstructed by such agreement?

## LIST OF PARTIES AND RULE 28.1 LIST

The parties before the Court of Appeals and this Court are all listed in the caption.[1]

CSX Transportation, Inc. ("CSXT") is a wholly-owned subsidiary of CSX Corporation ("CSX"). The subsidiaries and affiliates of CSXT or CSX, other than those wholly owned by them, are:

The Akron Union Passenger Depot Company;
Allegheny and Western Railway Company;
Augusta and Summerville Railroad Company;
The Baltimore and Cumberland Valley Railroad Extension Company;
The Baltimore and Philadelphia Railroad Company;
Beaver Street Tower Company;
Central Transfer Railway and Storage Company;
Chatham Terminal Company;
Clearfield and Mahoning Railway Company;
The Cleveland Terminal & Valley Railroad Company;
Dayton and Michigan Railroad Company;
Dayton and Union Railroad Company;
The Home Avenue Railroad Company;
The Lakefront Dock and Railroad Terminal Company;
Mid-Allegheny Corporation;
North Charleston Terminal Company;
Richmond-Washington Company, which has a subsidiary, RF&P Corporation;
Winston-Salem Southbound Railway Company;
Woodstock & Blockton Railway Company

---

[1] In the Court of Appeals, this case was consolidated for oral argument and decision with D.C. Circuit Case No. 88-1694, *American Train Dispatchers' Ass'n* v. *Interstate Commerce Commission and United States of America*. The parties in that case were petitioner, American Train Dispatchers' Association; respondents, Interstate Commerce Commission and the United States of America; and intervenors, Norfolk & Western Railway Co. and Southern Railway Co. CSXT understands that Norfolk & Western and Southern are also filing a petition for a writ of certiorari with respect to the D.C. Circuit decision herein.



## TABLE OF CONTENTS


*Page*

QUESTION PRESENTED ..... i

LIST OF PARTIES AND RULE 28.1 LIST ..... ii

OPINIONS BELOW ..... 2

JURISDICTION ..... 2

STATUTES INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING THE WRIT ..... 8

I. The Court of Appeals' Interpretation of ICA § 11341(a) Conflicts with Decisions of This Court and Other Circuits ..... 8

II. The Court of Appeals' Ruling that Congress Did Not Intend the Immunity from "All Other Law" in ICA § 11341(a) to Include Collective Bargaining Agreements Is Contrary to the Act's Purpose and Legislative History ..... 14

CONCLUSION ..... 19

APPENDIX (Separately Bound)

Opinion and Judgment of the Court of Appeals in *Brotherhood of Railway Carmen* v. *Interstate Commerce Commission*, 880 F.2d 562 (D.C. Cir. 1989) ..... 1a

September 29, 1989, orders of the Court of Appeals denying rehearing ..... 30a

Decision of the Interstate Commerce Commission in *CSX Corporation—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 4 I.C.C.2d 641 (1988) ..... 33a

*Page*

Opinion and Award, *In the Matter of the Arbitration Between Brotherhood Railway Carmen—Division of BRAC, Organization, and CSX Transportation, Inc. and the Chesapeake and Ohio Railway Company, Carriers,* March 23, 1987 ..... 53a

Transportation Act of 1920, § 407, 41 Stat. 480 ..... 118a

Emergency Railroad Transportation Act of 1933, Title I, § 10(a), 48 Stat. 215, and Title II, § 202, 48 Stat. 217, 219 ..... 118a

Transportation Act of 1940, § 7, 54 Stat. 908-09 ..... 119a



## TABLE OF AUTHORITIES

**Judicial Decisions:** *Page*

*Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211 (1899) ..... 9

*Altman* v. *Central of Georgia Ry Co.*, 488 F.2d 1302 (D.C. Cir. 1973) ..... 14

*American Airlines* v. *C.A.B.*, 445 F.2d 891 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972) ..... 12

*American Train Dispatchers' Ass'n* v. *I.C.C.*, No. 88-1694 (D.C. Cir.) ..... ii

*Andrews* v. *Louisville & N. R. Co.*, 406 U.S. 320 (1972) ..... 13

*Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986) ..... 12

*Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry Co.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963) ..... 11, 17

*Brotherhood of Locomotive Engineers* v. *I.C.C.*, 761 F.2d 714 (D.C. Cir. 1985), *vacated*, 482 U.S. 270 (1987) ..... 10

*Brotherhood of Locomotive Engineers* v. *I.C.C.*, 885 F.2d 446 (8th Cir. 1989) ..... 12

*Bundy* v. *Penn Central Co.*, 455 F.2d 277 (6th Cir. 1972) ..... 12

*Burlington Northern, Inc.* v. *American Ry Supervisors Ass'n*, 503 F.2d 58 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975) ..... 11

*Burlington Northern R.R.* v. *United Transportation Union*, 848 F.2d 856 (8th Cir.), *cert. denied sub nom. Interstate Commerce Commission* v. *United Transportation Union*, 109 S.Ct. 499 (1988) ..... 12

*California* v. *Taylor*, 353 U.S. 553 (1957) ..... 13

*City of Palestine, Texas* v. *United States*, 559 F.2d 408 (5th Cir. 1977), cert. denied, 435 U.S. 950 (1978) ..... 14

Page

*Colorado* v. *United States*, 271 U.S. 153 (1926) ..... 9

*Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) ..... 9

*County of Marin* v. *United States*, 356 U.S. 412 (1958) ..... 8

*Detroit & Toledo Shore Line R.R.* v. *United Transportation Union*, 396 U.S. 142 (1969) ..... 13

*International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963) ..... 13

*International Ass'n of Machinists* v. *Northeast Airlines, Inc.*, 473 F.2d 549 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972) ..... 12

*International Ass'n of Machinists* v. *Northeast Airlines, Inc.*, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976) ..... 12

*Interstate Commerce Commission* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) ..... 10, 18

*Kent* v. *C.A.B.*, 204 F.2d 263 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953) ..... 11, 12

*Kesinger* v. *Universal Airlines, Inc.*, 474 F.2d 1127 (6th Cir. 1973) ..... 12

*Missouri Pacific R. Co.* v. *United Transportation Union*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987) ..... 12

*Nemitz* v. *Norfolk & W. Ry Co.*, 436 F.2d 841 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971) ..... 11

*New York* v. *United States*, 257 U.S. 591 (1922) ..... 9

*New York Dock Ry* v. *United States*, 609 F.2d 83 (2d Cir. 1979) ..... 4

*Norman* v. *Baltimore & O. R.R. Co.*, 294 U.S. 240 (1935) ..... 9

*Pittsburgh & Lake Erie R.R. Co.* v. *Railway Labor Executives' Ass'n*, 109 S.Ct. 2584 (1989) ..... 18



Page

*Railway Labor Executives' Ass'n* v. *Guilford Transportation Industries, Inc.*, 667 F.Supp. 29 (D. Me. 1987), *aff'd per curiam*, 843 F.2d 1383 (1st Cir. 1988), *cert. denied*, 109 S.Ct. 3213 (1989) ..... 12

*Railway Labor Executives' Ass'n* v. *I.C.C.*, 883 F.2d 1079 (D.C. Cir. 1989) ..... 12

*Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. 142 (1950) ..... 17, 18

*Schwabacher* v. *United States*, 334 U.S. 182 (1948) ..... 8, 9

*Texas* v. *United States*, 292 U.S. 522 (1934) ..... 9, 15, 17

*United States* v. *Lowden*, 308 U.S. 225 (1939) ..... 8, 9, 10

*United Transportation Union* v. *Norfolk & Western Ry Co.*, 332 F.Supp. 1170 (N.D. Ohio 1971) ..... 12

**Interstate Commerce Commission Decisions:**

*Brandywine Valley R.R. Co.—Purchase—CSX Transportation, Inc., Lines in Florida*, 5 I.C.C.2d 764 (1989) ..... 12

*CSX Corporation—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 363 I.C.C. 521 (1980) ..... 3

*Gulf, Mobile & Ohio R. Co.—Abandonment*, 282 I.C.C. 311 (1952) ..... 14

*New York Dock Ry—Control—Brooklyn Eastern Dist. Term.*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry* v. *United States*, 609 F.2d 83 (2d Cir. 1979) ..... 4

*Southern Ry Co.—Control—Central of Georgia Ry Co.*, 331 I.C.C. 151 (1967) ..... 15

*Page*

**Statutes and Rules:**

Emergency Railroad Transportation Act of 1933, 48 Stat.

211 ..... 16

Title I ..... 16, 17, 18

Title I, § 10(a), 48 Stat. 215 ..... 16

Title II ..... 3, 17

Title II, § 202, 48 Stat. 219 ..... 16

Interstate Commerce Act

§ 5 ..... 17

§ 5(8) ..... 15

§ 5(11) ..... 18

§ 5(15) ..... 16, 17

§ 10901, 49 U.S.C. §10901 ..... 18

§ 11341(a), 49 U.S.C. § 11341(a) ..... *passim*

§ 11343(a), 49 U.S.C. § 11343(a) ..... 3

§ 11344(b)(1)(D), 49 U.S.C. § 11344(b)(1)(D) ..... 3

§ 11344(c), 49 U.S.C. § 11344(c) ..... 4

§ 11347, 49 U.S.C. § 11347 ..... 4, 7, 12

Pub. L. No. 95-473, § 3(a), 92 Stat. 1466 ..... 18

Railway Labor Act, 45 U.S.C. § 151 *et seq* ..... *passim*

Transportation Act of 1920, § 407, 41 Stat. 480 ..... 3, 15

Transportation Act of 1940, § 7, 54 Stat. 908-09 ..... 3, 18

28 U.S.C. § 1254(1) ..... 2

28 U.S.C. § 2321(a) ..... 7

28 U.S.C. § 2342(5) ..... 7



*Page*

Supreme Court Rule 20.4 ..... 2

**Other Authorities:**

84 Cong. Rec. (1939) ..... 18

*Hearings on H.R. 2531 Before the House Comm. on Interstate and Foreign Commerce*, 76th Cong., 1st Sess (1939) ..... 17

*Hearings on H.R. 5641 Before the House Comm. on Interstate and Foreign Commerce*, 70th Cong., 1st Sess. (1928) ..... 16

*Hearings on S.J. Res. 161 Before the Senate Comm. on Interstate Commerce*, 71st Cong., 2d Sess. (1930) ..... 16

No.

# In The
# Supreme Court of the United States
## October Term, 1989

---

**CSX TRANSPORTATION, INC.,**

*Petitioner,*

*v.*

**BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,**

*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Petitioner CSX Transportation, Inc. ("CSXT") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled proceeding on July 25, 1989.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 880 F.2d 562 and is reprinted in the separately bound Appendix at 1a.

The June 8, 1988, decision of the Interstate Commerce Commission, which was reviewed by the Court of Appeals, is reported at 4 I.C.C.2d 641 and is reprinted in the Appendix at 33a.

The March 23, 1987, arbitration decision, which was reviewed by the Interstate Commerce Commission, has not been reported. It is reprinted in the Appendix at 53a.

## JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered its judgment on July 25, 1989. App. 29a. CSXT timely filed a petition for rehearing, which was denied by the Court of Appeals by order dated September 29, 1989. App. 30a.[1] The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1). This petition has been filed within the time period provided by Supreme Court Rule 20.4.

## STATUTES INVOLVED

Interstate Commerce Act ("ICA"), § 11341(a), 49 U.S.C. § 11341(a) (excerpt):

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this sub-chapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

[1] A petition for rehearing was also filed by Norfolk & Western Railway Company and Southern Railway Company, intervenors in D.C. Cir. No. 88-1694. *See* ii n.1, *supra*. This petition was denied by the Court of Appeals on September 29, 1989. App. 30a. The Interstate Commerce Commission also filed a petition for rehearing, in which it asked the Court of Appeals to defer any ruling thereon until after the Commission's decision on remand. By order dated September 29, 1989, the court remanded the record in this matter to the Commission and ordered that consideration of the Commission's petition be deferred pending release of the ICC's decision on remand. App. 32a.



Section 11341(a)'s predecessors, found in § 407 of the Transportation Act of 1920, 41 Stat. 480; Title II, § 202 of the Emergency Railroad Transportation Act of 1933, 48 Stat. 219; and § 7 of the Transportation Act of 1940, 54 Stat. 908-09, are located in the Appendix at 118a-120a.

## STATEMENT OF THE CASE

### I. The Creation of the Consolidated CSX Rail System

In 1980, the ICC approved, pursuant to 49 U.S.C. § 11343(a), the application of CSX Corporation to control the rail subsidiaries of Chessie System, Inc. and Seaboard Coast Line Industries, Inc.[2] *CSX Corporation–Control–Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 363 I.C.C. 521 (1980) ("*CSX–Control*"). After weighing all of the evidence before it, including evidence and arguments submitted by rail labor organizations (*see* 49 U.S.C. § 11344(b)(1)(D)), the Commission concluded that substantial economies would result from the creation of this consolidated

[2] Among the railroads controlled by Chessie was the Chesapeake and Ohio Railway Company ("C&O"). Seaboard Coast Line Industries controlled the Seaboard Coast Line Railroad Company ("SCL") and the Louisville and Nashville Railroad Company ("L&N"), *inter alia*. On December 29, 1982, SCL merged with L&N to form Seaboard System Railroad, Inc. On July 1, 1986, Seaboard System Railroad changed its name to CSX Transportation, Inc. ("CSXT"), Petitioner herein. C&O subsequently merged into CSXT in 1987.

rail system and, accordingly, that the proposal was consistent with the public interest. 49 U.S.C. § 11344(c). 363 I.C.C. at 597-98. The Commission conditioned its approval with its standard *New York Dock* labor conditions,[3] which comply with the requirements of 49 U.S.C. § 11347. *Id.* at 589.[4]

Following the Commission's decision in *CSX–Control*, the rail carriers controlled by CSX Corporation embarked on a series of actions – facility consolidations and operational coordinations – designed to realize the economies and efficiencies the ICC had found to be in the public interest.

---

[3] *New York Dock Ry–Control–Brooklyn Eastern Dist. Term.*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry* v. *United States*, 609 F.2d 83 (2d Cir. 1979).

[4] The *New York Dock* Conditions provide employees affected by a rail consolidation with up to six years of income protection as well as reimbursement for moving costs and losses from the sale of a home. Art. I, §§ 5, 6, 9, 12.

The conditions also contain an expedited bargaining/arbitration procedure for the establishment of a so-called "implementing agreement" between the carriers and rail unions representing employees affected by an ICC-approved consolidation. An implementing agreement prescribes the method for selecting and assigning employees in order to accomplish operational changes that result from such a consolidation. Under Art. I, § 4(a) of *New York Dock*, the carrier must give the employees and their unions at least 90 days written notice of an operational change that may result in the rearrangement of forces. If the parties are unable to achieve an implementing agreement "provid[ing] for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case" after bargaining for 30 days, either party may submit the dispute for a binding determination by a neutral arbitrator. The arbitrator must be selected within five days, and the arbitration hearing must commence within 20 days thereafter. The arbitrator must render his decision within 30 days of the hearing. The carrier may not implement the proposed operational change until an agreement has been reached through collective bargaining or prescribed through arbitration. Art. I, § 4(b).

The *New York Dock* Conditions have been described as "significantly more protective of the interests of railway labor than any previously imposed single set of employee protective conditions." *New York Dock Ry*, 609 F.2d at 91.



## II. The Waycross-Raceland Shop Consolidation and the LaRocco Arbitration Award

On August 29, 1986, CSXT and C&O gave the notice required under *New York Dock* Art. I, § 4(a) of their intent to close the CSXT freight car heavy repair shop in Waycross, Georgia, and to consolidate that work with that being performed in the counterpart C&O shop at Raceland, Kentucky, as a further part of the overall consolidation approved in *CSX–Control*. When bargaining with the Brotherhood of Railway Carmen ("BRC") over the terms of an implementing agreement to govern the shop consolidation was unsuccessful, both the railroads and BRC invoked arbitration under *New York Dock* Art. I, § 4(a).

Even though BRC had initially sought arbitration of the dispute, the union argued to the three-man arbitration committee, headed by Neutral Referee John LaRocco, that the committee lacked authority to impose an implementing agreement moving carmen and their work from the BRC agreement with the SCL at Waycross to the BRC agreement with the C&O at Raceland. BRC asserted that the carriers first had to exhaust the bargaining procedures prescribed in the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq*. In addition, BRC claimed that certain Waycross carmen who were covered by the so-called Orange Book Agreement[5] and the work they perform could not under the terms of that agreement be moved beyond the boundaries of the former SCL system.

The arbitration committee ruled that the Commission where necessary may supersede the bargaining agreement. App. 80a. Accordingly, the committee concluded that, as the Commission's surrogate, it had the authority to adopt an implementing agreement providing for the movement of both the work and

---

[5] The Orange Book Agreement was entered into effective August 1, 1966, in connection with the July 1, 1967, merger of the Seaboard Air Line Railroad Company ("SAL") and the Atlantic Coast Line Railroad Company ("ACL") to form SCL. The Orange Book provides income protection to individuals employed by either SAL or ACL on or before the July 1, 1967, merger for the remainder of their working lives.

employees who perform it from Waycross to Raceland, notwithstanding any inconsistent provisions in existing collective bargaining agreements. The committee adopted an implementing agreement transferring the car repair work to Raceland and overriding a provision of the Orange Book that it found precluded that work transfer. However, the Committee refused to override a provision of the Orange Book agreement that it found precluded Orange Book-protected employees from being transferred from Waycross to Raceland. App. 85a.[6]

### III. The Commission's Ruling on Appeal

Both BRC and CSXT appealed the arbitration award to the Commission. In its June 8, 1988, decision (4 ICC 2d 641; App. 33a), the Commission affirmed the arbitration committee's determination that it had the authority to prescribe an implementing agreement moving both work and employees, notwithstanding BRC's claims that it lacked such authority and that any change in existing agreements and working conditions could be accomplished only through the RLA's bargaining procedures. 4 I.C.C.2d at 649; App. 43a. However, the Commission reversed the award with regard to the arbitration committee's refusal to override the Orange Book provision that the committee found prohibited the transfer of employees outside the former SCL system. The Commission found that this Orange Book provision served as an impediment to the implementation of the rail consolidation it had authorized:

> Once it is determined that a proposed transaction is authorized by the Commission . . . , the carrier is permitted to carry out and fully implement the transaction despite potential impediments in existing agreements upon compliance with the provisions for the protection of the rights of employees contained in *New York Dock* or imposed by the Commission upon the involved transaction.

[6] CSXT and C&O subsequently implemented that portion of their proposed transaction allowed by the arbitration award, transferring the repair work and non-Orange Book-protected employees to Raceland.



4 I.C.C.2d at 650; App. 44a.[7]

### IV. The Court of Appeals Decision

BRC sought review of the Commission's decision by the D.C. Circuit under 28 U.S.C. §§ 2321(a) and 2342(5). The court, in a July 25, 1989, opinion, reversed the Commission's decision and remanded the record to the Commission for further proceedings. The Court of Appeals ruled that ICA § 11341(a) did not empower the Commission to override contracts, including collective bargaining agreements.[8] The court based its decision on the fact that the § 11341(a) exemption includes "all other law" but does not specifically refer to "contracts." In addition, the court saw no support for the Commission's interpretation of that section in its language or history, or in the design of the ICA as a whole. 880 F.2d at 567-68; App. 12a-13a. The court remanded the record to the Commission for consideration of whether the Commission's modification of collective bargaining agreement provisions that would stand in the way of approved rail consolidations might be supported by other provisions of the ICA.[9]

[7] Accordingly, the Commission did not consider CSXT's alternate contention that the arbitration committee had misinterpreted the Orange Book as prohibiting the transfer of work and employees outside the former Seaboard system. The Court of Appeals did not address this issue either.

[8] The Court of Appeals erroneously concluded that the Commission's decision deprived Orange Book-protected carmen of their working-lifetime income protection. 880 F.2d at 564; App. 6a. In fact, the Commission clearly explained that it was reversing the arbitration award only "to the extent it holds that CSX may not require transfer of SCL employees as well as work from Waycross to Raceland." 4 I.C.C.2d at 650; App. 44a. Accordingly, Orange Book-protected carmen transferring to Raceland would take their Orange Book income protection with them.

[9] Thus, the Court of Appeals did not decide whether the Commission might possess the authority to prescribe a procedure to modify such agreements as a result of the Commission's obligation to impose labor conditions on its approval of rail consolidations in ICA § 11347, 49 U.S.C. § 11347. 880 F.2d at 573-74; App. 25a-26a. Similarly, the court did not rule on whether a carrier was immune from complying with procedures of the RLA as a result of ICA § 11341(a), preferring to let the Commission reconsider this issue on remand. 880 F.2d at 573; App. 25a.

## REASONS FOR GRANTING THE WRIT

This case presents questions of exceptional importance for the railroad industry in that, if not corrected, the decision will thwart the achievement of the national transportation policy of fostering and encouraging rail carrier consolidations.[10]

The Court of Appeals' decision is in conflict with at least two decisions of this Court: *Schwabacher* v. *United States*, 334 U.S. 182 (1948), and *United States* v. *Lowden*, 308 U.S. 225 (1939). Furthermore, it is in conflict with decisions from the Courts of Appeals of at least four circuits. These decisions, virtually ignored by the court below, have consistently recognized that Congress intended the ICA to take precedence over all obstacles arising under both state and federal "law", including contracts.

In addition, the Court of Appeals' interpretation of § 11341(a) is manifestly contrary to Congress's expressed intent. Congress has demonstrated that it fully intended and understood that collective bargaining agreements are within the scope of the ICA immunity provisions.

### I. The Court of Appeals' Interpretation of ICA § 11341(a) Conflicts with Decisions of this Court and Other Circuits

The Court of Appeals reached its unprecedented interpretation of ICA § 11341(a) through a most simplistic analysis. The court noted that the word "contract" is not literally found in that section, and it located no legislative history that it believed demonstrated that Congress had intended to include contracts within the reach of that provision. *But see* Section II, *infra*. On this basis, it declared that contracts, including collective bargaining agreements, are outside the immunity provision's scope. The Court of Appeals' decision is contrary to the decisions of this Court and other Courts of Appeals that have uniformly

---

[10] *See United States* v. *Lowden*, 308 U.S. 225, 232 (1939) ("As a result of the enactment of the Transportation Act of 1920, consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy . . . . "); *County of Marin* v. *United States*, 356 U.S. 412, 416 (1958) (recognizing Congressional purpose "to facilitate merger and consolidation in the national transportation system" behind revisions to section 5 of the ICA in the Transportation Act of 1940).



ruled that Congress in fact intended that private contracts, and collective bargaining agreements in particular, not stand in the way of the implementation of rail consolidations found to be in the public interest.

A. The panel cited no precedent for its blanket conclusion that § 11341(a) does not give the ICC authority to override contracts even where necessary to implement an approved rail consolidation.[11] This Court held directly to the contrary in *Schwabacher* v. *United States*, 334 U.S. 182, 188, 199 (1948), when it concluded that the ICC had authority to supersede "contract rights under Michigan law" flowing from a rail corporation's charter. This Court observed that, as a result of the ICA's immunity provisions, "[i]n matters within [the ICA's] scope it is the supreme law of the land." 334 U.S. at 198. *See also Texas* v. *United States*, 292 U.S. 522, 531 (1934) ("Even explicit charter provisions must yield to the paramount regulatory power of the Congress." ); *Colorado* v. *United States*, 271 U.S. 153, 165 (1926) *(semble)*; *New York* v. *United States*, 257 U.S. 591, 601 (1922) *(semble)*.[12]

Moreover, this Court recognized in *United States* v. *Lowden*, *supra*, that ICC-approved rail consolidations will inevitably result in major changes in the working conditions of rail employees, including changes in conditions, such as seniority

---

[11] The Court of Appeals reasoned, "Under the ICC's reading, it could set to naught, in order to facilitate a merger, a carrier's solemn undertaking, in a bond indenture or a bank loan, to refrain from entering into any such transaction without the consent of its creditors. . . . We do not think it likely that Congress would grant the ICC a power with so much potential to destabilize the railroad industry . . . . " 880 F.2d at 567-68; App. 13a.

[12] In the court below BRC claimed that the ICC's actions amounted to a "taking" of its members' property in violation of the Fifth Amendment. The Court of Appeals did not reach this issue. 880 F.2d at 574; App. 26a. This Court has long recognized that contracts that deal with a subject matter appropriately regulated by the federal government under the commerce power may be modified without violating the Fifth Amendment. *See, e.g., Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986); *Norman* v. *Baltimore & O. R.R. Co.*, 294 U.S. 240, 307-11 (1935); *New York* v. *United States*, 257 U.S. at 601; *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211, 230 (1899).

rights,embodied in collective bargaining agreements. "Not only must unification result in wholesale dismissals and extensive transfers, involving expense to transferred employees, but in the loss of seniority rights which, by common practice of the railroads are restricted in their operation to those members of groups who are employed at specified points or divisions." 308 U.S. at 233. This Court ruled in *Lowden* that the ICC could properly impose labor protective conditions to ameliorate the effects of such changes to collective bargaining agreements on employees.

In addition, four members of this Court have also declared that an ICC consolidation order supersedes the RLA and its collective bargaining agreement terms as a result of § 11341(a). In *Interstate Commerce Commission* v. *Brotherhood of Locomotive Engineers,* 482 U.S. 270 (1987), the union argued that its members had rights under the RLA *and their collective bargaining agreements* to perform certain work and that those rights were violated by an ICC trackage rights order that approved other labor arrangements. 482 U.S. at 295. The railroads responded that they were immune from complying with these agreement terms and the RLA as a result of § 11341(a). A panel of the D.C. Circuit ruled that the Commission was required to make explicit findings of "necessity" before the immunity provision would apply. *Brotherhood of Locomotive Engineers* v. *ICC,* 761 F.2d 714, 723 (D.C. Cir. 1985).[13]

The majority of this Court did not reach this issue, ruling that the D.C. Circuit had lacked jurisdiction over the union's petition for administrative review. 482 U.S. at 277-87. Justice Stevens, in a concurring opinion joined by Justices Brennan, Marshall, and Blackmun, however, would have reached the merits and would have reversed the D.C. Circuit on the grounds that the immunity provisions of the ICA are self-executing and do not depend on any explicit "necessity" findings. 482 U.S. at 298. Significantly, these justices did not even intimate that

---

[13] In so ruling, the D.C. Circuit implicitly held that the ICC had the statutory authority to immunize rail carriers from compliance with the RLA and established rights arising out of collective bargaining agreements, so long as it made express findings of the "necessity" for such immunity.



§ 11341(a) does not supersede the RLA or obligations arising out of collective bargaining agreements in the rail industry.

B. Prior to the Court of Appeals' decision herein, at least four Courts of Appeals have ruled that an ICC-authorized consolidation or merger supersedes inconsistent terms in collective bargaining agreements and the RLA, from which they originate, as a result of the ICA immunity provisions in § 11341(a). In the seminal decision in *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry Co.,* 314 F.2d 424 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963), the Eighth Circuit rejected arguments that a carrier's rearrangement of forces after a merger unilaterally and unlawfully changed agreements, concluding, "[T]he ICC['s] power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist." 314 F.2d at 430. The Eighth Circuit observed, " 'A private contract must yield to the paramount power of the [Commission] to perform its duties under the statute creating it to approve mergers . . . . ' " 314 F.2d at 430, *quoting Kent* v. *Civil Aeronautics Board,* 204 F.2d 263, 266 (2d Cir.), *cert. denied,* 346 U.S. 826 (1953).

The Seventh Circuit has also ruled that the ICC in connection with a rail merger could supersede the RLA and its bargaining agreements as a result of the ICA's immunity provisions. *Burlington Northern, Inc.* v. *American Ry Supervisors Ass'n,* 503 F.2d 58, 62-63 (7th Cir. 1974), *cert. denied,* 421 U.S. 975 (1975) (Merger protection agreement found not to be inconsistent with RLA but "if it were its provisions would be controlling." ). The Sixth Circuit similarly has acknowledged the necessity for supplanting bargaining agreements and the RLA in an ICC-authorized transaction in *Nemitz* v. *Norfolk & W. Ry Co.,* 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds,* 404 U.S. 37 (1971):

> The authority vested in the I.C.C. to effectuate proposed mergers would be rendered ineffective if authority to adjust work realignments through fair compensation did not exist. Since, under the Railway Labor Act, employees cannot be compelled to accept or arbitrate new working rules or conditions, the application of the Railway Labor Act . . . , like the Harrington Amendment, would threaten to prevent many consolidations, and, therefore, should not be applied.

*See also Railway Labor Executives' Ass'n* v. *Guilford Transportation Industries, Inc.*, 667 F.Supp. 29, 35 (D. Me. 1987), *aff'd per curiam*, 843 F.2d 1383 (1st Cir. 1988), *cert. denied*, 109 S.Ct. 3213 (1989); *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794, 800 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986) ("ICC has the power to approve a transaction and exempt its participants from legal obstacles that would impede its fruition.").[14]

---

[14] *See also Burlington Northern R. Co.* v. *United Transportation Union*, 848 F.2d 856, 863 (8th Cir.), *cert. denied sub nom. Interstate Commerce Commission* v. *United Transportation Union*, 109 S.Ct. 499 (1988) ("When the ICA provides a specific exemption from all other law and mandates inescapable employee protective conditions under provisions such as 49 U.S.C. §§ 11341(a), 11347, it effectively supersedes . . . the RLA . . . . "); *Missouri Pacific R. Co.* v *United Transportation Union*, 782 F.2d 107, 111 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987) ("MOPAC is exempted under § 11341(a) of the Interstate Commerce Act . . . from the requirements of the Railway Labor Act (RLA) with respect to major disputes."); *Bundy* v. *Penn Central Co.*, 455 F.2d 227, 279-80 (6th Cir. 1972); *United Transportation Union* v. *Norfolk & Western Ry Co.*, 332 F.Supp. 1170, 1174 (N.D. Ohio 1971).

The courts have similarly ruled that the Civil Aeronautics Board in airline mergers could supersede the RLA and collective bargaining agreement provisions that would interfere with the merger, even in the absence of express statutory language comparable to § 11341(a). *See International Ass'n of Machinists* v. *Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); *International Ass'n of Machinists* v. *Northeast Airlines, Inc.*, 473 F.2d 549, 559-60 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972); *Kesinger* v. *Universal Airlines, Inc.*, 474 F.2d 1127, 1131-32 (6th Cir. 1973); *American Airlines* v. *CAB*, 445 F.2d 891, 896 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972); *Kent* v. *CAB*, 204 F.2d 263, 265-66 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953).

Subsequent to the Court of Appeals decision herein, another panel of the D.C. Circuit and an Eighth Circuit panel, both in dicta, have cited the holding of the instant case without further analysis. *See Railway Labor Executives' Ass'n* v. *I.C.C.*, 883 F.2d 1079 (D.C. Cir. 1989); *Brotherhood of Locomotive Engineers* v. *I.C.C.*, 885 F.2d 446 (8th Cir. 1989). In addition, in *Brandywine Valley R.R. Co.—Purchase—CSX Transportation, Inc., Lines in Florida*, 5 I.C.C.2d 764, 772 n.5 (1989), the ICC stated that it "do[es] not dispute the limited holding" of the Court of Appeals herein. CSXT submits that, for the same reasons that the Court of Appeals erred, the Commission has erred in apparently acquiescing in this holding.



Furthermore, the Court of Appeals committed a fundamental and unprecedented error of analysis when it considered the impact of § 11341(a) on collective bargaining agreements apart from the effects of that section on the RLA. In none of the decisions cited above did a Court of Appeals create such an artificial dichotomy between the RLA and collective bargaining agreements existing thereunder. Rail collective bargaining agreements are creatures of, and solely enforceable under, the RLA. *See, e.g., Detroit & Toledo Shore Line R.Co.* v. *United Transportation Union*, 396 U.S. 143, 156 (1969) (RLA § 2 Seventh "operates to give legal and binding effect to collective agreements"); *Andrews* v. *Louisville & N. R. Co.*, 406 U.S. 320, 323 (1972) (an RLA agreement is "a federal contract and ... therefore governed and enforceable by federal law, in the federal courts," *quoting International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 692 (1963)). Indeed, as creatures of the RLA – a federal law – rail collective bargaining agreements supersede inconsistent provisions of state law under the Supremacy Clause. *See California* v. *Taylor*, 353 U.S. 553, 561 (1957). Each of the Courts of Appeals that has addressed this question, with the sole exception of the court below, has recognized this fundamental truth and has ruled that the ICC has the authority under § 11341(a) to override both collective bargaining agreements that impede approved rail consolidations and the RLA.

Finally, the Courts of Appeals have similarly ruled that the Commission can supersede contracts other than collective bargaining agreements, following this Court's decision in *Schwabacher*. *See Altman* v. *Central of Georgia Ry Co.*, 488 F.2d 1302, 1305-07 (D.C. Cir. 1973) (claims for payment of dividends allegedly due under railroad charter and bylaws barred by ICC decision as a result of ICA immunity provision). *Cf. City of Palestine, Texas* v. *United States*, 559 F.2d 408, 414 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978) (assuming that Congress gave ICC power to abrogate contracts).[15]

Accordingly, Petitioner CSXT submits that a writ of certiorari should issue because of the conflict between the decision herein and the aforementioned decisions of this Court and other Courts of Appeals.

## II. The Court of Appeals' Ruling that Congress Did Not Intend the Immunity from "All Other Law" in ICA § 11341(a) to Include Collective Bargaining Agreements Is Contrary to the Act's Purpose and Legislative History

The legislative history of § 11341(a) clearly demonstrates that Congress intended the immunity provisions of the ICA to apply to impediments arising out of collective bargaining agreements.The Court of Appeals limited its analysis solely to the legislative history of the Transportation Act of 1920, in which

[15] The Court of Appeals also misconstrued the ICC's decision in *Gulf, Mobile & Ohio R. Co.–Abandonment*, 282 I.C.C. 311 (1952), as representing the ICC's view that the ICA does not authorize the override of private contractual rights. 880 F.2d at 567; App. 13a. That case involved an abandonment, to which the immunity provisions found in the rail consolidation chapter of the ICA do not apply. In fact, the ICC explained in *Gulf, Mobile* that it could set aside "vested rights of other parties . . . upon a clear grant of statutory authority similar to that contained in Section 5(11) [now § 1134(a)]." 282 I.C.C. at 335.



§ 11341(a) originated,[16] and the 1926 RLA, [17] and professed to find no relevant later indications that Congress intended to bring collective bargaining agreements within the reach of § 11341(a). 880 F.2d at 567, 570; App. 13a, 18a-19a. In addition to misreading the limited legislative history it did consider, the Court of Appeals ignored other relevant history that demonstrates that Congress understood and intended that the ICA immunizes consolidating rail carriers from collective bargaining agreement provisions to

[16] In sweeping language, Congress provided in 1920 in ICA § 5(8) that ICC orders approving carrier consolidations and unifications superseded all other federal and state statutes "and all other restraints or prohibitions by law". ICA § 5(8), as added by Transportation Act of 1920, § 407, 41 Stat. 480. App. 118a.

It is apparent from the section's text that a significant Congressional concern was to relieve consolidating rail carriers from the effects of the Clayton Act and inconsistent provisions of local state transportation statutes. However, had Congress intended to limit the reach of the immunity language to encompass only the antitrust laws and state regulatory statutes, it clearly could have done so without adding the general provision encompassing "all other restraints or prohibitions by law, State or Federal." *See Texas* v. *United States*, 292 U.S. at 534-35 (immunity not limited to antitrust statutes; scope of immunity must be measured by Congress' purpose: "the promotion of economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure").

[17] There is no evidence in the legislative history of the RLA that Congress intended that statute to be an exception to the general immunity provisions of the ICA, enacted just six years earlier. As the Commission itself remarked some years later in *Southern Ry Co.–Control–Central of Georgia Ry Co.*, 331 I.C.C. 151, 154 (1967), Congress did not intend the RLA to occupy the field with respect to rail consolidations. "No protection was provided [in the RLA] for employees adversely affected by railroad consolidations."

Indeed, Congress expressly provided in § 7 Third (f) of the RLA, 45 U.S.C. § 157 Third (f), that a certified copy of any arbitration award that resolves a bargaining or "major" dispute under the RLA must be filed with the ICC and that "such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended." Thus, Congress' intention that the procedures and obligations arising out of the RLA should be subservient to the powers of the Commission under the ICA, extensively revised by Congress only six years earlier in the Transportation Act of 1920, cannot have been more plainly expressed.

the extent necessary to carry out ICC-authorized mergers and consolidations.

Rail labor first sought the passage of amendments to the ICA in both 1928 and 1930 that would have required the ICC, as a condition of a merger authorization, to preserve existing collective bargaining agreement provisions.[18] Such amendments would have been wholly unnecessary if carriers were not already permitted under the ICA to rearrange forces and change working conditions notwithstanding impediments in such agreements.

Congress' intent that collective bargaining agreements not be exempted from the ICA immunity provisions was most clearly demonstrated in connection with its enactment of the Emergency Railroad Transportation Act of 1933 ("ERTA" ). 48 Stat. 211. As part of the temporary, emergency measures located in Title I of ERTA, Congress passed an immunity provision, modeled after that in the Transportation Act of 1920, that applied to rail carriers that were consolidating under the emergency authority given in ERTA to the new office of Federal Railroad Coordinator. ERTA Title I, § 10(a); 48 Stat. 215; App. –. However, the temporary immunity provision in Title I of ERTA expressly excepted from its scope "any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder *or through contracts entered into in accordance with the provisions of said act.*" App. 118a; emphasis added.

In Title II, § 202 of ERTA Congress amended and reenacted the permanent consolidation provisions of the ICA. The immunity provision was modified and became renumbered ICA § 5(15). 48 Stat. 219; App. 119a. Significantly, however, Congress did not add a proviso excepting collective bargaining agreements from the scope of the ICA's permanent immunity language, in

---

[18] *See, e.g., Hearings on H.R. 5641 Before the House Comm. on Interstate and Foreign Commerce*, 70th Cong., 1st Sess., Pts. 1-4, at 336-37 (1928) (statement of Mr. Dougherty, Vice Pres., Brotherhood of Railway Trainmen); *Hearings on S.J. Res. 161 Before the Senate Comm. on Interstate Commerce*, 71st Cong., 2d Sess. 244 (1930) (RLEA proposed ICA amendment to provide, as a condition of ICC approval of a rail consolidation, "[t]hat contractual and legal obligations to . . . employees shall be maintained . . . .").



marked contrast to the temporary immunity provision in Title I.[19] Thus, under the temporary, emergency provisions of ERTA, carrier consolidations resulting from orders of the Federal Railroad Coordinator were subject to compliance with the terms of collective bargaining agreements. Following ERTA's expiration in 1936, however, consolidating rail carriers continued to be relieved of all "restraints or prohibitions by or imposed under authority of law, State or Federal" without any such exception for collective bargaining agreements, as a result of ICA § 5(15), the predecessor of § 11341(a). App. 119a.

In 1940, Congress substantially amended the ICA's merger provisions. *See generally Railway Labor Executives' Ass'n v. United States*, 339 U.S. 142 (1950). At the urging of rail labor, a bill was introduced by Representative Lea that would have amended the ICA's immunity provision to include language identical to that of Title I of ERTA that would have provided an exception for collective bargaining agreements. H.R. 2531, § 209, reprinted in *Hearings on H.R. 2531 Before the House Comm. on Interstate and Foreign Commerce*, 76th Cong., 1st Sess., Pt. 1 at 9 (1939). Representative Harrington subsequently proposed an amendment to the ICA even more favorable to labor that would have prevented the impairment of any collective bargaining agreement terms as well as the layoff or displacement of

---

[19] This Court has previously relied upon the differences between the scope of the immunities conferred in Titles I and II of ERTA. In *Texas v. United States, supra*, this Court noted that in § 11 of Title I Congress expressly provided that carriers acting pursuant to the emergency powers of the Federal Coordinator were *not* thereby relieved of "any *contractual* obligation" to maintain offices or shops at any point, but that Title II contained no such exception. As this Court explained, "The insertion of the provision in Title I, with its restricted application, and the omission of a similar provision from Title II, indicate an intentional distinction." 292 U.S. at 534. *See also Railway Labor Executives' Ass'n v. United States*, 339 U.S. at 151 n.13 (noting differences between temporary provisions in Title I of ERTA and permanent amendments to § 5 of ICA found in Title II); *Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry Co.*, 314 F.2d at 432 n.2 (*semble*).

any employees as a result of mergers.[20] Congress rejected both proposals. Instead it reenacted in ICA § 5(11) a broad immunity from "the operation ... of all ... restraints, limitations, and prohibitions of law, Federal, State, or municipal."[21] This provision has now been recodified in § 11341(a).[22]

Thus, except for 1933-36, when Congress temporarily excepted collective bargaining agreements from the reach of the immunity conferred on consolidating carriers in the emergency provisions in Title I of ERTA, Congress has demonstrated its intent that the immunity from "all law" contained § 11341(a) of the ICA permits the supersession of impediments to rail mergers arising out of collective bargaining agreements.[23] The Court of Appeals' decision interprets the immunity provisions now found in § 11341(a) of the ICA in a way that Congress expressly rejected in both 1933 and 1940 and which is totally

---

[20] The proposed Harrington Amendment stated:

> Provided, however, that no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, *or in the impairment of existing employment rights of said employees.*

84 Cong. Rec. 9882 (1939); emphasis added. As this Court recognized in *Railway Labor Executives' Ass'n*, 339 U.S. at 151, the Harrington Amendment "threatened to prevent all consolidations to which it related."

[21] Section 5(11) of the ICA, as enacted in § 7 of the Transportation Act of 1940, c. 722, 54 Stat. 908-09; App. 119a-120a.

[22] ICA § 5(11) was recodified in 1978 as ICA § 11341 (a). Pub. L. No. 95-473, §3(a), 92 Stat. 1466. As Justice Stevens noted in *Interstate Commerce Commission* v. *Brotherhood of Locomotive Engineers*, 482 U.S. at 299 n. 12 (1987) (Stevens, J. concurring), the change in language as a result of the 1978 codification caused no substantive change.

[23] Nothing in this Court's decision last term in *Pittsburgh & Lake Erie R.R. Co.* v. *Railway Labor Executives' Ass'n*, 109 S.Ct. 2584 (1989), is to the contrary. The transaction at issue in that case – a sale of rail lines to a new carrier under ICA § 10901 – was not governed by the consolidation provisions of the ICA and, hence, was not encompassed within § 11341(a)'s immunity provisions.



inconsistent with the relevant legislative history. For this further reason, a writ of certiorari should be issued to review that decision.

## CONCLUSION

For the reasons set forth herein, Petitioner CSX Transportation, Inc. respectfully submits that its petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES S. WHITEHEAD
*(Counsel of Record)*
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703

NICHOLAS S. YOVANOVIC
JAMES D. TOMOLA
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

*Attorneys for Petitioner*
*CSX TRANSPORTATION, INC.*

Date: December 27, 1989

(2) No. 89-1028

Supreme Court, U.S.
FILED
DEC 28 1989

# In The
# Supreme Court of the United States
## October Term, 1989

---

**CSX TRANSPORTATION, INC.,**

*Petitioner,*

*v.*

**BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,**

*Respondents.*

---

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

JAMES S. WHITEHEAD
*(Counsel of Record)*
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703

NICHOLAS S. YOVANOVIC
JAMES D. TOMOLA
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

*Attorneys for Petitioner*
*CSX TRANSPORTATION, INC.*

Date: December 27, 1989

American Reprographics Management, Inc.™ (312) 333-2784

## TABLE OF CONTENTS

*Page*

Opinion and Judgment of the Court of Appeals in *Brotherhood of Railway Carmen* v. *Interstate Commerce Commission*, 880 F.2d 562 (D.C. Cir. 1989) ..... 1a

September 29, 1989, orders of the Court of Appeals denying rehearing ..... 30a

Decision of the Interstate Commerce Commission in *CSX Corporation–Control–Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 4 I.C.C.2d 641 (1988) ..... 33a

Opinion and Award, *In the Matter of the Arbitration Between Brotherhood Railway Carmen–Division of BRAC, Organization, and CSX Transportation, Inc. and the Chesapeake and Ohio Railway Company, Carriers*, March 23, 1987 ..... 53a

Transportation Act of 1920, § 407, 41 Stat. 480 ..... 118a

Emergency Railroad Transportation Act of 1933, Title I, § 10(a), 48 Stat. 215, and Title II, § 202, 48 Stat. 217, 219 ..... 118a

Transportation Act of 1940, § 7, 54 Stat. 908-09 ..... 119a

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Argued April 25, 1989 Decided July 25, 1989

No. 88-1724

BROTHERHOOD OF RAILWAY CARMEN, et al., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

CSX TRANSPORTATION, INC., INTERVENOR

---

No. 88-1694

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and the
UNITED STATES OF AMERICA, RESPONDENTS

NORFOLK & WESTERN RAILWAY CO. and
SOUTHERN RAILWAY CO., INTERVENORS

---

Petitions for Review of Orders of the
Interstate Commerce Commission

---

*William G. Mahoney*, with whom *John O'B. Clarke, Jr.* was on the brief, for petitioners.

*John J. McCarthy, Jr.*, General Counsel, Interstate Commerce Commission, with whom *Robert S. Burk*, General Counsel, and *Henri F. Rush*, Deputy General Counsel, Interstate Commerce Commission, were on the brief, for respondent. *Robert J. Wiggers* and *John J. Powers, III*, Attorneys, Department of Justice, also entered appearances for respondent.

*James S. Whitehead*, for intervenor in No. 88-1724.

*Jeffrey S. Berlin*, with whom *Mark E. Martin*, *Amy R. Doberman* and *William P. Stallsmith, Jr.*, were on the brief, for intervenors in No. 88-1694.

Before: WALD, *Chief Judge*, and EDWARDS and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* D.H. GINSBURG.

D.H. GINSBURG, *Circuit Judge*: The Brotherhood of Railway Carmen and the American Train Dispatchers' Association petition for review of orders of the Interstate Commerce Commission issued in separate proceedings before that agency. We dispose of the two cases together because they raise common issues with respect to the ICC's authority to exempt a party to a merger between railway carriers subject to approval under § 11344 of the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* (the Act), from the provisions of (1) a Collective Bargaining Agreement (CBA); and (2) the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

Because we conclude that the ICC has misperceived, in one important respect, the scope of its exemptive power, we grant each petition for review in part, and remand the cases to the ICC for further proceedings.



## I. FACTUAL BACKGROUND

The operative facts of the two transactions here at issue, and the background of the respective administrative proceedings, are as follows:

### A. *The Carmen's Case*

In 1980, the ICC approved a proposal under which CSX Corporation, a newly-formed holding company, would acquire control of two other holding companies: (1) the Chessie System, Inc., the principal railroad subsidiaries of which were the Chesapeake and Ohio Railway Company (C&O) and the Baltimore and Ohio Railroad Company; and (2) Seaboard Coast Line Industries, Inc., the parent of the Seaboard Coast Line Railroad (Seaboard) (later to become CSX Transportation, Inc., or CSX). *CSX Corporation—Control—Chessie System, Inc., and Seaboard Coast Line Industries, Inc.*, 363 I.C.C. 521 (1980) (*CSX Control*).

In its order approving the transaction, the ICC imposed upon the parties a standard set of labor-protective conditions, as required by § 11347 of the Act, 49 U.S.C. § 11347. *CSX Control*, 363 I.C.C. at 588-92, 604. As usual in merger cases, the applicable conditions were transplanted from the ICC's decision in *New York Dock*, 360 I.C.C. 60, 84-90 (1979), *aff'd*, *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). Section 4 of the *New York Dock* conditions establishes procedures for the resolution—by means of negotiation and, failing that, binding arbitration—of any labor dispute arising from an ICC-approved railroad consolidation. Accordingly, § 4 requires a "railroad contemplating a transaction which . . . may cause the dismissal or displacement of any employees, or rearrangement of forces [to] give at least ninety . . . days written notice . . . ." Section 2 is a status quo provision:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and

> benefits . . . under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements.

In 1986, CSX, invoking § 4 of the *New York Dock* conditions, notified the labor organizations representing its employees that it intended to close its freight car repair shop at Waycross, Georgia, and to transfer the work performed there to the C&O repair shop at Raceland, Kentucky, and that the transfer would result in a net decrease in available jobs at the two shops. The Brotherhood then attempted, on behalf of certain CSX employees who would be affected by the transfer, to negotiate an agreement governing the labor-related changes that the Waycross-Raceland consolidation would require.

Relations between the Brotherhood (and other unions) and CSX were governed by a CBA—known as the "Orange Book"—that they had negotiated in connection with the 1967 merger that created Seaboard; CSX and the Brotherhood continued to observe these terms after the 1980 *CSX Control* transaction. The Orange Book provides, with exceptions not here relevant, that the carrier will employ each covered employee for the remainder of his working life, and that no covered employee "shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment." In consideration for this job protection, the Orange Book gives the carrier the right "to transfer the work of the employees protected [t]hereunder throughout the merged or consolidated [i.e., Seaboard] system . . . ."

The negotiations between CSX and the Brotherhood failed due to disagreements as to (1) whether displaced Waycross employees would retain their Orange Book right to lifetime income; and (2) whether (a) the Waycross-Raceland consolidation would result in a change in



working conditions, and, if so, (b) CSX would be required to comply with the terms of § 6 of the RLA, 45 U.S.C. § 156, and thus to bargain before effecting the change. The Brotherhood then invoked the mandatory arbitration provision of the *New York Dock* conditions, but shortly thereafter, reversed its position and claimed that because the shop consolidation was not contemplated by the *CSX Control* transaction, the *New York Dock* conditions were not applicable at all. By then, however, CSX had invoked arbitration under the *New York Dock* conditions, and the matter came before a three-member arbitration panel (the *Carmen* Committee), with the Brotherhood participating under protest.

In the proceedings before the Committee, it became clear that CSX sought not only to transfer *work* from Waycross to Raceland and to reduce the total number of positions, but also (1) to transfer certain Waycross *employees* to employment by the C&O in Raceland and (2) to remove them from the protection of the Orange Book to coverage under the CBA between the C&O and the Union, which apparently does not contain a lifetime income clause. The Committee held that the Orange Book prohibited CSX from transferring either work or employees outside the Seaboard system created by the 1967 merger. The ICC did not pass upon that determination, but CSX, which has intervened in this appeal, does not dispute it.

The Committee then held, however, that (1) it had the power, "[a]s a quasi-judicial extension of the ICC" to abrogate provisions of a CBA, and to relieve CSX from any requirement of the RLA, that stood in the way of an operational change, such as the shop transfer, that was "authorized or required" by—though not specifically referenced in—the *CSX Control* decision approving the 1980 merger; and (2) it would (a) abrogate the Orange Book prohibition on the transfer of work, but not on the transfer of employees, outside the old Seaboard system,

and (b) exempt CSX from the RLA insofar as it might require the carrier to bargain before unilaterally changing the Orange Book with respect to the work transfer.

The ICC upheld the Committee in other respects, but reversed the Committee's decision not to abrogate the Orange Book prohibition on the transfer of employees as well as work. The ICC further held that, to the extent that switching CSX employees from the Orange Book to the CBA at Raceland would deprive them of their right to income for life, that right would be abrogated. It did not pass upon the question whether the Orange Book did in fact prohibit the transfer of either work or employees but assumed as much.

In its petition for review, the Brotherhood challenges the ICC's authority under the Act to override provisions of the Orange Book and of the RLA. It also claims that the ICC's decision, insofar as it overrides the Orange Book, violates the Compensation Clause of the Fifth Amendment to the Constitution. Finally, it challenges the standard of review that the ICC applied in reversing the Committee's ruling against employee transfers.

B. *The Dispatchers' Case*

In March 1982, the ICC approved the application of NWS Enterprises, Inc. (now Norfolk Southern, or NS), a holding company, to acquire control of two previously separate carriers—the Norfolk and Western Railway Company (N&W) and the Southern Railway Company (Southern). *Norfolk Southern Corp.—Control—Norfolk & Western Ry. Co.*, 366 I.C.C. 173 (1982) (*NS Control*). As in *The Carmen's Case*, the ICC imposed upon the parties to the transaction the standard *New York Dock* conditions. *Id.* at 231.

The American Train Dispatchers' Association was the bargaining representative of certain N&W employees responsible for power distribution. In September 1986,



N&W and Southern informed the Association that they intended "to coordinate certain [N&W] work performed in the System Operations Center . . . in Roanoke, Virginia into the [Southern] Control Center in Atlanta, Georgia," and in so doing, to abolish several supervisory positions at Roanoke. The carriers proposed an implementing agreement whereby the affected N&W supervisors would be "given consideration" for employment in new positions as Superintendents in Atlanta. Superintendents there were considered management employees, however, and were not covered by any CBA.

Attempts to negotiate an implementing agreement foundered over the Association's contentions that (1) the carriers' proposal was subject to mandatory bargaining under the RLA; (2) the carriers were required to preserve the right of the transferred employees to representation under RLA § 2, *Fourth*, 45 U.S.C. § 152, *Fourth*; and (3) the affected employees were entitled to retain their rights, including their seniority rights, under the CBA with N&W. The carriers then asked the National Mediation Board to appoint an arbitrator pursuant to the *New York Dock* conditions. As in *The Carmen's Case*, the dispute came before a three-member arbitration committee (the *Dispatchers'* Committee), which ruled in favor of the carriers on each of the disputed issues.

The rationale of the *Dispatchers'* Committee with respect to the CBA and the RLA was essentially the same as that of the *Carmen* Committee. It concluded that (1) it had the power to abrogate any CBA or RLA provision that impeded implementation of the ICC-approved merger of the N&W and the Southern; (2) the transfer of distribution functions, though not specifically considered in the *NS Control* case, was part of the control transaction; and (3) apparently because application of the N&W CBA to Superintendents at Southern would impede the transfer, transferred employees could not retain their rights under that CBA.

On June 6, 1987, after the ICC had denied the Association's application for a stay of the Committee's award, the carriers effected the work transfer authorized thereby. On June 10, 1988, the ICC affirmed the Committee in all respects, stating, in particular, that the Committee's third ruling was supported by the record insofar as "[i]mposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function." The ICC also rejected the Association's claim that the transfer would deprive the employees of their right to representation under Section 2, *Fourth* of the RLA, reasoning that "[the Association's] rights as an incumbent bargaining representative are for determination by the National Mediation Board."

In its petition for review, the Association maintains that the ICC lacks authority under the Act to relieve the carrier of its obligation under the RLA and its CBA, and that its decision depriving the employees of their rights under the CBA violates the Compensation Clause of the Fifth Amendment.

## II. Legal Background

Before taking up the merits of this dispute, we discuss briefly the relevant statutory framework, the agency's position below, and its claim to *Chevron* deference for that position in this court.

### A. *Statutory Background*

Sections 11341 and 11344 of the Act require that the parties to certain transactions listed in § 11343, including carriers proposing to merge, first get ICC approval. 49 U.S.C. §§ 11341, 11343, 11344(a), (c). Under § 11344(c), the ICC must approve any such proposal "when it finds the transaction is consistent with the public interest." As noted earlier, § 11347 requires that



it also impose upon the merging carriers certain labor protective conditions; and it generally meets this requirement by imposing the *New York Dock* conditions described above.

Section 11341(a) provides that upon ICC approval of a § 11343 transaction:

> A carrier . . . participating in that approved . . . transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

49 U.S.C. § 11341(a). This is the so-called immunity provision at the center of this case.

### B. *The Agency's Position*

In its decisions in these cases, the ICC asserted that it has the power, which devolves upon an arbitration committee convened under § 4 of the *New York Dock* conditions, to relieve a party to a § 11343 transaction from any provision of a CBA or of the RLA that stands in the way of implementing that transaction. Its rationale for this assertion was less than clear, however, due largely to its failure to analyze separately the statutory provisions upon which it relied and their relation to the specific rights it purported to abrogate.

#### 1. *Collective Bargaining Agreements*

The ICC appears to have relied upon two bases for its claim that it may abrogate the provisions of a CBA. First, it cited the immunity provision, § 11341(a), stating that it empowered an arbitrator appointed under the *New York Dock* conditions "to override existing agreements by requiring the work and employees to be moved . . . ." *Carmen*, Joint Appendix (J.A.) 204; *id.*

at 207 (Committee correctly understood ICC's view to be that § 11341(a) overcomes "all legal obstacles preventing implementation" of an approved § 11343 transaction); *accord Dispatchers*, J.A. 290-91. As both Committees noted, the ICC had come to this position only recently, in *Denver and Rio Grande Western R.R. Co.—Trackage Rights—Missouri Pacific R.R. Co.*, Finance Docket 30,000, *served* Oct. 25, 1983 (*DRGW*), *rev'd sub nom Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd on other grounds*, 482 U.S. 270 (1987). *Cf. Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151, 170 (1967) (immunity provision does not relieve carrier from CBA limitation on transfer of employees).

In *The Carmen's Case*, the ICC appeared also to rely upon § 4 of the *New York Dock* conditions, which it read as supporting the Committee's ruling that it had "the absolute authority . . . to effect changes in work and employee assignments," notwithstanding any CBA provision to the contrary. J.A. 207.

The ICC renews each of these theories on appeal.

2. *The Railway Labor Act*

The ICC also appears to have advanced two sources for its power to override the RLA. First, it stated that the immunity provision exempts the parties to an approved § 11343 transaction from any RLA procedure that might impede the effectuation of the transaction. *Carmen*, J.A. 204-05, 207 (recounting, and apparently approving, the Committee's conclusion "that, under the immunity provisions of [§] 11341(a), implementation of transactions that we authorize under [§] 11343, such as *CSX Control*, supersede employee protections under the RLA"); *accord Dispatchers*, J.A. 290. The ICC had reached similar conclusions in *DRGW*, *supra*, and in *Union Pacific Corp., Union Pacific R.R. Co. and Missouri Pacific R.R. Co.—Control—Missouri-Kansas-Texas R.R. Co., et al.*,



4 I.C.C. 2d 409, 514 (1988), a petition for review of which is currently pending before this court, *see Railway Labor Executives Ass'n v. ICC*, No. 88-1391 (argued April 28, 1989).

Second, the ICC stated that "[t]he mandatory arbitration provisions of *New York Dock* take precedence over the RLA dispute resolution procedures in transactions approved by this Commission . . . ." *Dispatchers* J.A. 289; *accord Carmen*, J.A. 204. As we read it, the ICC's position was that when Congress enacted the current version of § 11347, which incorporates by reference a set of dispute resolution procedures culminating in mandatory arbitration, it intended those procedures to be exclusive where they applied. Although it nowhere expressly abandons this theory, the ICC does not argue it in this court; it relies solely upon its § 11341(a) theory.

C. *Chevron Deference*

The ICC argues that its interpretation of the relevant provisions of the Act is entitled to deference under the principles set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), and that we should therefore uphold that interpretation as long as it is reasonable. We agree that *Chevron* applies to the ICC's reading of the statute that it is charged with implementing. *Chevron* establishes, however, two steps for judicial review of an agency's interpretation of law: we do not proceed to the question whether the agency's interpretation is permissible, and thus entitled to deference, unless we have first determined, based upon the language of the statute and the "traditional tools of statutory construction," *id.* at 843 n.9, that Congress has not "directly spoken to the precise question at issue . . .; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. We strike out first in search of

Congress's intent in enacting the immunity provision of the Act.

## III. Analysis

"In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988). We begin, as always, with the relevant portion of the statute (§ 11341(a)):

> . . . A carrier or corporation participating in or resulting from a transaction approval by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control of franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is *exempt from the antitrust laws and from all other law, including State and municipal law*, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

### A. *Collective Bargaining Agreements*

We cannot sustain the ICC's position that this provision empowers it to override a CBA. First, and most important, the ICC's position finds no support in the language of the statute. By its terms, § 11341(a) contemplates exemption only from "the antitrust laws and from all other law" to the extent necessary to carry out the transaction. Nowhere does it say that the ICC may also override contracts, nor has it ever, in any of the various iterations since its initial enactment in 1920, included even a general reference to "contracts," much less any specific reference to CBAs. Nor has the ICC explained how we can read the term "other law," as it has done, to mean "all legal obstacles." *Dispatchers*, J.A. 207. None of the Supreme Court decisions, discussed



below, authorizing the ICC to abrogate an "other law" even suggests that the term means "all legal obstacles." The ICC itself, prior to its 1983 decision in *DRGW*, recognized as much. *See Gulf, Mobile & Ohio R.R. Co.—Abandonment*, 282 I.C.C. 311, 335 (1952) ("None of the decisions in the [Supreme Court] cases . . . relates to private contractual rights, but refers [sic] to State laws which prohibit in some way the carrying out of the transaction authorized.").

Moreover, the ICC's proposed insertion of "all legal obstacles" into the statutory language would lead to most bizarre results. Under the ICC's reading, it could set to naught, in order to facilitate a merger, a carrier's solemn undertaking, in a bond indenture or a bank loan, to refrain from entering into any such transaction without the consent of its creditors. *Cf. Gulf, Mobile & Ohio*, 282 I.C.C. at 331-35 (declaring itself without power, in an abandonment context, to relieve a carrier from its "contractual obligations for the payment of rent"). We do not think it likely that Congress would grant the ICC a power with so much potential to destabilize the railroad industry; we are confident, however, that it would not do so without so much as a word to that effect in the statute itself. Never, either in its decisions here under review or in prior cases, has the ICC offered any justification for this most unlikely reading of the Act.

Perhaps we could tolerate the ICC's reading if it found strong support in either the "design of the statute as a whole," *K Mart*, 108 S.Ct. at 1817, or in its legislative history. We find nothing there upon which to sustain it, however; if anything, both tend to support the meaning conveyed by the words of the statute itself.

Congress first introduced the immunity provision, in a somewhat different form, in 1920. Transportation Act, 1920, 66th Cong., 41 Stat. 456, 482 (1920) (amending § 5 of the Act) (1920 Act) § 407. In the 1920 Act,

Congress deputized the ICC to design a master plan to consolidate the nation's railroads into a limited number of strong systems; the plan was to be implemented by voluntary action on the part of the carriers. 41 Stat. 481 (§§ 5(4), 5(6), *See generally Schwabacher v. United States*, 334 U.S. 182, 191-93 (1948). It also, for the first time, gave the ICC exclusive jurisdiction to approve railroad consolidations; the agency was directed to approve any proposed consolidation that it found to be consistent with (1) its master plan; and (2) the public interest. (Congress removed the first criterion when, in 1940, it discarded the idea of a master plan. *See id.* at 193.)

The immunity provision of the 1920 Act provided that:

> The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order shall be, and *they are hereby, relieved from the operation of the "antitrust laws," . . . and of all other restraints or prohibitions by law, State or Federal,* in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

41 Stat. 482 (§ 5(8) (emphasis added)).

It is reasonably clear from the history of the 1920 Act what Congress intended the immunity provision to accomplish. In 1917, President Wilson, in the exercise of his wartime powers, had taken possession of the railroads, in part to consolidate them into a unified transportation system in aid of the national defense. *See* Priorities Act, 65th Cong., 40 Stat. 272 (1917); Federal Control Act, 65th Cong., 40 Stat. 451 (1918). *See generally 32d Annual Report of the Interstate Commerce Commission* (1918) (*1918 Annual Report*) at 1-2. Prior to that time, the ICC's authority over the railroads was relatively limited; the States, on the other hand—through



their ratemaking commissions, their corporation laws, and their police powers—intensively regulated the carriers' rates, finances, and operations. Whereas state regulation had at first severely hampered efforts to enlist the railroads in the war efforts, *Schwabacher*, 334 U.S. at 191, during the period of nationalization, neither state nor federal law stood in the way of the Government's purpose to further the war effort.

In 1920, when the period of federal control was about to end, Congress thought it imperative to the transportation needs of the nation that a program of coordination and consolidation be continued; this it chose to pursue, in part, by facilitating voluntary consolidations in accordance with the master plan the ICC was to develop. *Id.* at 191-94. *See* H. Rep. No. 456, 66th Cong. at 6-7, 18-19 (1919); H. Rep. No. 650, 66th Cong. at 643-64 (1920). *See generally* I.L. Sharfman, *The Interstate Commerce Commission* 153-70, 183 (1931). The carriers' return to private ownership, however, would bring with it two complications.

First, they would be again subject to regulation by the uncoordinated and often unfriendly state commissions and legislatures. As the Supreme Court stated in *Transit Commission v. United States*, 289 U.S. 121, 127 (1933):

> . . . Prior to the Transportation Act, 1920, regulations coincidentally made by federal and state authorities were frequently conflicting, and often the enforcement of state measures interfered with, burdened and destroyed interstate commerce. Multiple control in respect of matters affecting such transportation has been found detrimental to the public interest as well as to the carriers. Dominant federal action was imperatively called for.

*See also Texas v. United States*, 292 U.S. 522, 530-31, 534-35 (1933) (in order "to insure an adequate transportation system" Congress gave the ICC power "to au-

thorize consolidations, purchases, leases, operating contracts, and acquisition of control," to the exclusion of state laws that would burden the ICC's master plan).

Second, they would be newly subject to regulation by the recently invigorated antitrust laws of the federal Government itself; the Supreme Court had recently held that § 1 of the Sherman Act made unlawful any merger between carriers that eliminated competition to even a limited extent. *See United States v. Union Pacific R.R. Co.*, 226 U.S. 61, 88-89 (1912).

Congress addressed both of these problems with the immunity provision of the 1920 Act. First, Congress placed in the ICC, and removed from the antitrust courts, the duty of considering the anticompetitive effects of any merger proposed to it. 41 Stat. 481 (§ 5(4)) (ICC master plant to preserve competition "as fully as possible"); *McLean Trucking Co. v. United States*, 321 U.S. 67, 73-78 (1944). Second, Congress continued its wartime policy to centralize supervision of the nation's railroads and to eliminate conflicting state authority; thus, for example, ICC-approved consolidations could go forward, aided by the immunity provision, free of interference by the States. This general, centralizing sentiment was echoed in other sections of the 1920 Act, which gave the ICC authority, notwithstanding contrary state law, to (1) approve any extension, construction, or abandonment of tracks, *see* 41 Stat. 477-78 (§§ 1(18), 1(20)); *Transit Commission*, 289 U.S. at 126-28; (2) reject or permit any proposed issuance of securities, 41 Stat. 494-95 (§§ 20a(2), 20a(7)); and (3) adjust rates it deemed unduly preferential or discriminatory, *id.* at 484 (§ 13(4)).

The ICC applied the immunity provision of the 1920 Act to exempt merging carriers from a wide variety of state law impediments. *See, e.g., Clinchfield Ry. Lease*, 90 I.C.C. 113, 134 (1924) (constitutional bar to foreign



corporation operating railroad in state); *Control and Operation of Louisiana & Arkansas Ry. Co.*, 150 I.C.C. 477, 487 (1929) (law forbidding consolidation, stock ownership, or lease of parallel or competing lines); *Control of San Antonio & Arkansas Pass Ry. by Southern Pacific Co.*, 94 I.C.C. 701, 704 (1925) (local corporate headquarters requirement); *Lease of Louisville, Henderson & St. Louis Ry. by Louisville & Nashville R.R. Co.*, 150 I.C.C. 741, 743-44 (1929) (law giving minority stockholders appraisal rights prior to sale of corporate property). And the Supreme Court consistently upheld its application. *See, e.g., Seaboard Air Line R.R. Co. v. Daniel*, 333 U.S. 118, 124-27 (1948) (local incorporation law); *Texas v. United States*, 292 U.S. at 531-35 (local corporate headquarters).

Thus, in the 1920 Act, Congress "made a new departure," *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R.R. Co.*, 257 U.S. 563, 585 (1922), pressing for consolidation of the nation's railroads in a legal environment that had long been hostile to such a notion. When, upon the recommendation of the ICC, *see Extension of Tenure of Government Control of the Railroads: Hearings Before the Committee on Interstate Commerce, United States Senate on the Extension of Time for Relinquishment by the Government of Railroads to Corporate Ownership and Control*, 65th Cong., Vol. 1 at 231-305, 339-377 (1919) (remarks of ICC Commissioner Edgar E. Clark); *Return of the Railroads to Private Control: Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on H.R. 4378*, 66th Cong. at 8-139, 2857-2966 (1919) (same), it enacted into law a voluntary consolidation/immunity program—which the ICC had originally advocated in 1917, *see Report of the ICC to the Senate and House of Representatives*, 56 Cong. Rec. 45, 65th Cong., H. Doc. 503 (Dec. 5, 1917) (reprinted in *1918 Annual Report* at 5-7)—it clearly meant to change that legal environment.

From our review of this history, we are confident that Congress did not intend, when it enacted the immunity provision, to override contracts. First, Congress focused nearly exclusively, in the hearings and debates on the 1920 Act, on specific types of laws it intended to eliminate—all of which were positive enactments, not common law rules of liability, as on a contract. *Cf. Association of Flight Attendants v. Delta Air Lines, Inc.*, No. 87-7040, slip op. at 23 (D.C. Cir. July 18, 1989). Indeed, Commissioner Clark, who presented the immunity idea to the House and Senate Commerce Committees in the hearings cited above, did not once suggest, over the course of several days and several hundred pages, that the proposed immunity might relieve a carrier of its obligations under negotiated agreements with third parties.

Moreover, in the legislative debates both on the 1920 Act and in 1926, when in the RLA it provided a framework for the regulation and enforcement of CBAs in the railroad industry, Congress exhibited a healthy respect for privately negotiated contracts; it rejected, for example, an amendment to the [illegible] that would have granted the ICC the power to suspend excessively generous wage agreements between carriers and their employees, in part on the ground that legislation abrogating labor agreements would be unconstitutional, *see* 67 Cong. Rec. 8884-86, 8892-93, 8896-97, 9190-91, 9196-97 (1926), and in part on the grounds that "there was a fundamental objection to making changes of a substantive nature in the agreement which the parties had reached," and that "[i]f agreement is to be resorted to [as a means of resolving labor management disputes], . . . the agreement should not be destroyed by placing in the act provisions which would have that effect." S. Rep. No. 606, 69th Cong. at 5-6 (1926). And never, on the several occasions when Congress has revisited the immunity provision, has it either broadened that provision so as to reach "all legal obstacles" to an ICC-approved transaction, or acted more specifically to bring "contracts" or



"collective bargaining agreements" within the reach of the statute.

Against this history as background, we can not impute to Congress the intention to make the bargained-for provisions of a CBA contingent upon their not later becoming inconvenient to the full realization of operating economies that a merger might make possible. *Cf. Association of Flight Attendants, supra*, slip op. at 23. We recognize that other forces may operate to abrogate a CBA in the post-merger context, as, for example, when the NMB, pursuant to its power under § 2, *Ninth* of the RLA, 45 U.S.C. § 152, *Ninth*, decertifies a union following an operational merger. *See, e.g., International Brotherhood of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 161 (5th Cir. 1983). We simply do not think that Congress has lodged any such power in the ICC, particularly where, as in each of these cases, the CBAs at issue survived the ICC-approved merger and were not, apparently, questioned by the parties thereto until the present disputes arose—several years after the merger.

B. *The Railway Labor Act.*

At least one court of appeals has held that the immunity provision of the Act may operate to override provisions of the RLA. *Brotherhood of Locomotive Engineers v. Chicago & Northwest Ry. Co.*, 314 F.2d 424, 431-32 (8th Cir. 1963). We decline to address the question here, however, for two reasons.

*First.* The Unions question whether the ICC has the power to apply the immunity provision at all. They note that § 11341(a) is in terms "self-executing," which we take to mean that its effect is not to be determined by the ICC when it passes upon a transaction, but rather by the appropriate tribunal for the resolution of a particular case in which it is invoked by a carrier as a defense to the application of some "other law." They draw

support for this position from two footnotes in Justice Stevens's concurring opinion in *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 300 nn. 13 & 14 (1987), in which the four Justices to reach the merits so opined.

It is true that the ICC has in the past itself taken this position. *See Chicago, St. Paul, Minneapolis & Omaha Ry. Co. Lease*, 295 I.C.C. 696, 702 (1958) (nothing in the Act "authorizes us to determine and declare the particular laws within the scope of [the immunity provision] from which a carrier shall be relieved. The terms of [the provision] are self-executing, and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints. It is sufficient if we make clear what the carrier is authorized to do. Congress has not conferred upon us the power to determine the disputes which are subject to the Railway Labor Act . . . .") (citation omitted).

The ICC's statement in *Chicago, St. Paul* is correct to the extent that it means that the Commission is not *required* to determine what the effect of the immunity provision will be, the Supreme Court has long so held. *New York Central Securities Corp. v. United States*, 287 U.S. 12, 26-27 (1932); *Claiborne-Annapolis Ferry Co. v. United States*, 285 U.S. 382, 391 (1922). The Court has also held, however, contrary to the implication of the first-quoted sentence from *Chicago, St. Paul*, that the ICC is *authorized* to make a determination, in approving a transaction, that laws standing in the way of its implementation must give way. *See Seaboard*, 333 U.S. at 124-27; *Texas v. United States*, 292 U.S. at 531-35; *Schwabacher*, 334 U.S. 182. *See also Gulf, Mobile & Ohio R.R. Co. Abandonment*, 282 I.C.C. 311, 335 (1952) (reading above cases as giving it the authority to set aside "State laws which prohibit in some way the carrying out of the transaction authorized"). Thus, we must reject the Unions' argument that the ICC lacks any power to consider a question of exemption that is properly presented to it.



Although the ICC's disclaimer of power in *Chicago, St. Paul* is overbroad insofar as it suggests that the ICC never has the power to determine a particular question of exemption, the result there can be reconciled with the Supreme Court cases cited above. In each of those cases the question of exemption arose before the consummation of the approved transaction; the issue was whether the ICC could, in the course of its approval of the transaction, remove a state law barrier to its effectuation. *See Schwabacher*, 334 U.S. at 200-01 (ICC may override state law granting dissenting stockholders right to block merger); *Seaboard*, 333 U.S. at 121; *Texas v. United States*, 292 U.S. at 531-32. As the Unions correctly note, *Chicago, St. Paul*—like the cases now before us—involved a carrier's request, submitted well after the consummation of the ICC-approved transaction, for exemption from the RLA. The ICC declined the carrier's request, saying:

> It is apparent that the [RLA] has not prevented the North Western from effectuating the transaction authorized by the prior order. That order authorized the lease by North Western of the lines of railroad and other properties owned, used, or operated by the Omaha, and this has been accomplished. The order did not provide any particular method for integration of the physical operations involved, and, except for the imposition of . . . conditions for the protection of employees, did not deal with employer-employee relationships.

295 I.C.C. at 702.

The ICC's broader disclaimer of any power to declare a carrier exempt from a law can thus be understood in the context in which it was presented; as the ICC interpreted the Act in 1958, it was without power to revisit an approved and successfully consummated transaction merely in order to relieve the merged carrier, after the fact, from the burden of complying with the RLA.

Even so understood, however, the ICC's holding in *Chicago, St. Paul* is still inconsistent with its current position; the transactions here at issue had long since been consummated when the ICC undertook to confer upon the merged carriers immunity from the RLA because it affected the "particular method for integration of the physical operations involved . . . ." 295 I.C.C. at 702.

An additional difficulty is presented by the ICC's ruling with respect to the RLA generally. The ICC's interpretation of the immunity provision, as of its 1958 decision in *Chicago, St. Paul*, was that Congress had not given it the power to override the RLA at all. It reaffirmed that view in 1967 in *Southern Railway Co., supra*, when it stated that, in the absence of a stand-by agreement among the affected carriers and unions that would displace their existing CBAs in the event of a rail merger, "section 6 of the [RLA] would seriously impede mergers," 331 I.C.C. at 170-71—a statement that would not make sense if the agency thought it had the power simply to override § 6 "as necessary" to let an approved transaction go forward.

The ICC's current interpretation of the immunity provision departs from this view, but we have found no explanation for the departure, save a citation in *DRGW*—the 1983 case in which it adopted its current stance—and decisions following it, to the Eighth Circuit's 1963 decision in *Chicago & North Western Ry., supra*. Because that case arose out of a dispute between a carrier and the unions representing its employees, however—a dispute to which the ICC was not a party—the court did not have the beenfit of the agency's (then presumably contrary) views on the matter, nor did it cite any ICC precedent in support of its conclusion (apparently because, as of that time, none existed). For the ICC now to reverse its position solely on the basis of the court's holding is somewhat troubling, for three reasons. First,



in 1967, in *Southern Railway Co.*, the ICC was still of the view, the Eight Circuit's intervening decision notwithstanding, that it lacked the authority to override the RLA. Second, in light of the ICC's close involvement with the historical development of the Act, it is disturbing that it would switch its position in unelaborated reliance upon a court case, which raised the issue in a different context and to which it was not a party, without giving any independent consideration to the matter. Third, the ICC has never related its current position to the context of the 1920 Act in which the immunity provisions first appeared; it has not, for example, related the original immunity provision in the 1920 Act to the comprehensive provisions of the same legislation governing labor-management relations, *see* 1920 Act, 41 Stat. 469-74—provisions that were, as we understand the legislative sequence, the immediate precursor to the RLA.

It may be that the ICC has made a conscious decision simply to depart from its earlier precedent. The ICC has not, however, said that it is doing so, much less articulated its reasons. As we stated in *Oil, Chemical and Atomic Workers Int'l Union v. NLRB*, 806 F.2d 269, 273-74 (D.C. Cir. 1986), "[w]e need hardly elaborate on the settled principle that an agency may not depart from its precedent without explaining and justifying its change in position."

*Second.* In light of our holding that § 11341(a) does not empower the ICC to override a CBA, it is unclear what are the consequences, if any, of its rulings that the carriers need not comply with the RLA. In *The Carmen's Case*, the heart of the dispute before the ICC was whether either the Commission or, derivatively, the Committee, had the power to relieve CSX from the terms of Orange Book that, as the Committee had interpreted them, prohibited the proposed transfer of work and of employees. The RLA was implicated, as we understand

the dispute, only insofar as the Brotherhood argued that CSX could not unilaterally depart from the Orange Book without first complying with the procedures of the RLA. Because the ICC, in response, started from a premise (that § 11341(a) gave it the power to relieve CSX of its contractual responsibilities) and reached a conclusion (that the RLA could not stand in the way of that power) that we hold was in error, it appears that nothing turns any longer on its conclusion. We remand the case to the ICC for reconsideration, however, in order to enable it to assess the situation in the first instance.

As for *The Dispatchers' Case*, the ramifications of our CBA ruling are somewhat less clear. There the CBA issue was whether the ICC could, by means of the immunity provision, relieve the N&W of obligations under its existing CBA in connection with the transfer of supervisory positions from Roanoke to Atlanta; the ICC said that it could, and we have held that it erred on that point. The RLA issues, as we understand them, were (1) whether the carriers could effect the transfer without first complying with the procedures of the RLA; and (2) whether the transfer, insofar as it deprived employees of rights under their CBA, violated the RLA. The second issue seems to drop out of this case for the same reason as the RLA issue appears to have become irrelevant in *The Carmen's Case*: because we hold that the ICC may not relieve the carriers of obligations under the CBA, the question whether it would violate the RLA to do so is purely hypothetical.

The first issue, if we are correct in stating it—the record on this point is less than crystal clear—may yet be alive. The ICC's opinion, however, gives us pause; it states that the continuation of the old agreement will "jeopardize the transaction"—by which it means not the merger but the transfer to Atlanta—"because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribu-



tion function." J.A. 291. Similarly, the carriers, as intervenors here, note that had the ICC not set aside the Roanoke CBA, its continuation "would have prevented the consolidation from going forward . . . ." Because we hold that the ICC was without authority to set aside that CBA, it is unclear how the carriers will proceed. They may find it both impractical to adhere to the Roanoke CBA in the Atlanta setting, because it would introduce non-uniform work rules, and uneconomical to renegotiate the Roanoke CBA in order to achieve such uniformity; if so, they may determine simply to transfer the employees back to Roanoke. There would then be no issue left, so far as we can tell, regarding their duty to comply with the procedures of the RLA.

In light of this uncertainty as to the effects of our ruling on the continued vitality of the disputes before us, we think it best to remand them for the ICC to determine whether there is any live RLA issue remaining. Should the ICC determine that further proceedings are necessary on the RLA issue, it should, on remand, either provide an explanation for its new position on that issue, or adhere to its prior position.

C. *Other Issues*

We decline to address either the ICC's theory that the labor protective conditions required by § 11347 of the Act are exclusive, or its related assertion, in *The Dispatchers' Case*, that § 4 of the *New York Dock* conditions gives the arbitration committee the "absolute right" to effectuate the transfer of employees, and to override any contrary provisions of a CBA. As noted earlier, the ICC has not argued the first theory to us at all; indeed, in its brief it took the position that the proceedings in *Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n*, —— S. Ct. ——, —— (No. 87-1589, slip op. June 21, 1989) (*P&LE*), which was then pending before the Supreme Court, were not relevant here, even though its ex-

clusivity argument before the Supreme Court would appear also to encompass both the § 11347 theory and the § 4 rationale advanced in the decisions here under review. We do not consider as a basis for affirming the decisions a ground upon which the agency places no reliance on appeal. *Cf. SEC v. Chenery Corp.*, 318 U.S. 80 (1943). In any event, we think it best for the ICC, if it has not abandoned its § 11347 and § 4 rationales altogether, to reconsider them in the first instance in light of the Supreme Court's intervening decision in *P&LE* rejecting the ICC's related position.

Because we hold that Congress did not, in enacting § 11341(a), give the ICC the power to override provisions of a CBA, we need not address either the Unions' arguments that to do so would be unconstitutional or their claim that, in amendments to the Act in 1976, Congress specifically preserved employees' contractual rights. Our decision also makes it unnecessary to reach either (1) the Brotherhood's argument in *The Carmen's Case* that the ICC applied an improper standard when it reversed the Committee's ruling in favor of the Union; or (2) the Association's argument that the ICC, in its decision in *The Dispatchers' Case*, deprived employees of their rights under § 2, *Fourth* of the RLA.

## IV. Conclusion

Because § 11341(a) of the Act does not grant the ICC its claimed power to override provisions of a CBA between a carrier and its employees, we grant the petitions for review in that respect and reverse the ICC's decision. We remand the cases with respect to the ICC's RLA holdings in order that the agency may determine whether further proceedings are necessary.

*It is so ordered.*



# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 88-1724** **September Term, 1989**

Brotherhood of Railway Carmen, et al.,
Petitioner

v.

Interstate Commerce Commission & USA
Respondents

CSX Transportation, Inc.
Intervenor

**No. 88-1694**

American Train Dispatchers' Association,
Petitioner

v.

Interstate Commerce Commission and the United States of America,
Respondents

Norfolk & Western Railway Co. and Southern Railway Company,
Intervenor

United States Court of Appeals For the District of Columbia Circuit

FILED SEP 29, 1989

CONSTANCE L. DUPRE CLERK

BEFORE: Wald, Chief Judge; Edwards and D.H. Ginsburg, Circuit Judges

**O R D E R**

It is ordered, by the Court, *sua sponte*, that the opinion of the Court filed on July 25, 1989 is amended as follows:

At Page 2, last line

delete the word "cases" and insert in lieu thereof the word "records"

Case Nos.: 88-1724 & 88-1694

At Page 24, line 9

delete the word "case" and insert in lieu thereof the word "record"

At Page 26, last paragraph, line 5

delete the word "cases" and insert in lieu thereof the word "records"

At Page 26, last paragraph

Add the following new text:

See General Rule 15(c).

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: WENDY JEMIS
for Robert A. Bonner
Deputy Clerk



# United States Court of Appeals

## FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 88-1724** **September Term, 1989**

Brotherhood of Railway Carmen, et al.,
Petitioner
v.
Interstate Commerce Commission & USA
Respondents
CSX Transportation, Inc.
Intervenor

**No. 88-1694**

American Train Dispatchers' Association,
Petitioner
v.
Interstate Commerce Commission and the United States of America,
Respondents
Norfolk & Western Railway Co. and Southern Railway Company,
Intervenor

United States Court of Appeals For the District of Columbia Circuit

FILED SEP 29, 1989
CONSTANCE L. DUPRE
CLERK

BEFORE: Wald, Chief Judge; Edwards and D.H. Ginsburg, Circuit Judges

**O R D E R**

These causes came on to be heard on the petitions for review of orders of the Interstate Commerce Commission and were argued by counsel. On consideration thereof, it is

**ORDERED AND ADJUDGED**, by the Court, that the petitions for review are granted in part and the records herein are remanded to the Commission for further proceedings, in accordance with the Opinion of the Court filed herein this date.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: WENDY JEMIS
for Robert A. Bonner
Deputy Clerk

Date: July 25, 1989

Opinion for the Court filed by Circuit Judge D. H. Ginsburg.

# United States Court of Appeals

## FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 88-1724** **September Term, 1989**

Brotherhood of Railway Carmen, et al.,
Petitioner

v.

Interstate Commerce Commission & USA
Respondents

CSX Transportation, Inc.
Intervenor

**No. 88-1694**

American Train Dispatchers' Association,
Petitioner

v.

Interstate Commerce Commission and the United States of America,
Respondents

Norfolk & Western Railway Co. and Southern Railway Company,
Intervenor

United States Court of Appeals For the District of Columbia Circuit

FILED SEP 29, 1989

CONSTANCE L. DUPRE
CLERK

BEFORE: Wald, Chief Judge; Edwards and D. H. Ginsburg, Circuit Judges

**O R D E R**

Upon consideration of the petitions for rehearing of Intervenors CSX Transportation, Inc. and Norfolk and Western Railway Company and Southern Railway Company, it is

**ORDERED**, by the Court, that the petitions are denied.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: WENDY JEMIS
for Robert A. Bonner
Deputy Clerk



# United States Court of Appeals

## FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 88-1724** **September Term, 1989**

Brotherhood of Railway Carmen, et al.,
Petitioner

v.

Interstate Commerce Commission & USA
Respondents

CSX Transportation, Inc.
Intervenor

**No. 88-1694**

American Train Dispatchers' Association,
Petitioner

v.

Interstate Commerce Commission and the United States of America,
Respondents

Norfolk & Western Railway Co. and Southern Railway Company,
Intervenor

United States Court of Appeals For the District of Columbia Circuit

FILED SEP 29, 1989

CONSTANCE L. DUPRE
CLERK

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges

**O R D E R**

The Suggestions For Rehearing *En Banc* of Intervenors CSX Transportation, Inc. and Norfolk and Western Railway Company and Southern Railway Company have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

**ORDERED**, by the Court *en banc*, that the suggestion is denied

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: WENDY JEMIS
for Robert A. Bonner
Deputy Clerk

# United States Court of Appeals

## FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 88-1724** **September Term, 1989**

Brotherhood of Railway Carmen, et al.,
Petitioner
v.
Interstate Commerce Commission & USA
Respondents
CSX Transportation, Inc.
Intervenor

United States Court of Appeals For the District of Columbia Circuit

**No. 88-1694**

American Train Dispatchers' Association,
Petitioner
v.
Interstate Commerce Commission and the United States of America,
Respondents
Norfolk & Western Railway Co. and Southern Railway Company,
Intervenor

FILED SEP 29, 1989
CONSTANCE L. DUPRE
CLERK

BEFORE: Wald, Chief Judge; Edwards, and D.H. Ginsburg, Circuit Judges

**O R D E R**

Upon consideration of the petition for rehearing of the Interstate Commerce Commission (ICC) and of the motion of petitioners for leave to file a response thereto it is

**ORDERED**, by the Court, that the Clerk is directed to file petitioners' lodged response and it is

**FURTHER ORDERED**, by the Court, that consideration of the aforesaid petition is deferred pending release of the ICC's decision on remand.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: WENDY JEMIS
for Robert A. Bonner
Deputy Clerk



INTERSTATE COMMERCE COMMISSION

Finance Docket No. 28905 (Sub-No. 22)

CSX CORPORATION — CONTROL — CHESSIE SYSTEM, INC. AND
SEABOARD COAST LINE INDUSTRIES, INC.

Finance Docket No. 21215 (Sub-No. 4)

SEABOARD AIR LINE R.R. CO. — MERGER — ATLANTIC COAST LINE R.R. CO.

Decided: June 8, 1988

Arbitration award reversed in part.

DECISION

BY THE COMMISSION:

On April 13, 1987, CSX Transportation, Inc. (CSX) and The Chesapeake and Ohio Railway Company (C&O) jointly filed a petition for administrative review of an arbitration committee's opinion and award in *Brotherhood Railway Carmen - A Division of BRAC* v. *CSX Transportation, Inc., and The Chesapeake and Ohio Railway Company* (LaRocco, March 23, 1987) (*BRC* v. *CSX*). The petition was filed in accordance with our decision in *Chicago and North Western Tptn. Co. —Abandonment*, 3 I.C.C.2d 729 (1987) (the so-called *Lace Curtain* decision).[1] There, we announced our appellate jurisdiction over, and scope of review of, arbitration awards that involve disputes over Commission-imposed labor protective conditions. On May 26, 1987, the Brotherhood Railway Carmen, Division of Brotherhood of Railway & Airline Clerks (BRC) filed an answer and cross-complaint in response to the CSX/C&O petition.[2] On June 15, 1987, CSX and C&O filed an answer to BRC's cross-complaint.

---

[1] "Lace Curtain" refers to a moving allowance provided under Article I, secion 9 of *Oregon Short Line R. Co. - Abandonment - Goshen*, 360 I.C.C. 91 (1979), the decision setting forth labor protective conditions imposed in the cited abandonment proceeding.

[2] In *Lace Curtain, supra*, we stated that these petitions for administrative review should be treated as complaints because they allege that the arbitration decisions misconstrued the Interstate Commerce Act and our labor protective conditions.

The arbitration committee was convened under the labor protective conditions we imposed in the lead consolidation proceeding [*CSX Corp. - Control - Chessie and Seaboard Co. I.I.*, 363 I.C.C. 521 (1980) (*CSX-Control*)]. At issue is a dispute concerning CSX/C&O's plan to close a freight car heavy repair shop at Waycross, GA, and to transfer the functions and most of the employees of that facility to a repair shop at Raceland, KY. In *BRC* v. *CSX*, the arbitration committee directed the parties to adopt an implementing agreement governing the repair shop transfer. Under the implementing agreement, the Waycross facility would be closed and the work formerly performed at Waycross and the Waycross employees would be transferred to Raceland, except that employees entitled to the benefits under the so-called "Orange Book" agreement [a labor protective agreement negotiated between a CSX predecessor, Seaboard Coast Line Railroad Company (SCL), and its unions, including BRC] could not be compelled to transfer to Raceland. As described above, CSX then sought review of the award.

We have undertaken a full administrative review of this arbitration proceeding because it involves a dispute under the labor protective conditions imposed in *CSX-Control* and raises significant issues of general importance to that and other consolidation decisions. We are reversing that part of the arbitration committee's decison that created an exception to its prescribed implementing agreement for Orange Book employees. This portion of the decision conflicts with the consolidation transaction authorized in *CSX-Control*.

## PRELIMINARY MATTERS

By decision served June 10, 1987, we denied BRC's May 22, 1987, request for a cease and desist order that sought to prevent CSX/C&O from implementing the repair shop transfer. We took under advisement BRC's embraced motion to dismiss CSX/C&O's petition for administrative review. In support of its motion to dismiss, BRC argues that, because CSX/C&O have begun to implement the repair shop transfer under the arbitration committee's decision, they have accepted the decision and waived their right to challenge it.



We are denying BRC's motion to dismiss. CSX/C&O have not waived their right to appeal the arbitration committee's decision. Their petition challenges only the Orange Book employee exception imposed in the arbitration committee's decision. Even though CSX/C&O have held open a sufficient number of positions at the Raceland facility to accommodate Waycross employees covered by the Orange Book agreement, it is clear that CSX/C&O have taken these precautions only to allow them to institute the transfer without breaching their legal obligations under the Orange Book exception should they fail to have it reversed. Thus, CSX/C&O have not acquiesced in the committee's decision.

CSX/C&O request waiver of 49 CFR 1115.2(d), which limits the length of appeals to 30 pages. Part 1115 does not technically apply to this matter. In any event, most of the extra pages in the CSX/C&O petition consists of pertinent portions of the lengthy arbitration record, which is helpful to our review.

BRC challenges our jurisdiction to decide the CSX/C&O petition. It contends, *inter alia*, that CSX/C&O's August 29, 1986, notice to BRCof the proposed repair shop transfer was inadequate under the requirements of the labor protective conditions imposed earlier in this proceeding. BRC requests dismissal of the CSX/C&O petition or, alternatively, oral hearing on the notice issue based on new evidence that BRC obtained after the arbitration hearing.

BRC's request is denied. The arbitration committee considered the notice issue, and, in a letter to the parties dated March 23, 1987, Arbitrator LaRocca denied BRC's motion to reopen based on the same evidence. Consistent with the substantial deference we will accord arbitrators on fact-bound issues, we will not reweigh the evidence here. Even if this issue involves interpreting our labor protective conditions, as BRC contends, we are satisfied that the interpretation was not improper.

Finally, BRC further challenges our jurisdiction by arguing that Federal district courts have exclusive jurisdiction to review arbitration decisions under 49 U.S.C. 11706(a) and that we may review the considered arbitration decision only by court referral. However, this argument was recently rejected in *United Transp.*

*Union* v. *Norfolk & Western Ry.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 700 (1988) (*UTU* v. *N&W*), where the District of Columbia Circuit Court of Appeals affirmed the dismissal of a railroad union's appeal of an arbitration award issued under Commission-imposed labor protective conditions. The Court of Appeals found that such an award is an order of the Commission, which, if final, is reviewable only by the Court of Appeals and, if not final, is not ripe for judicial review. We made similar findings in *Lace Curtain* and described our scope of review for arbitration decisions. We found that arbitration decisions are not final as to issues within our described scope of review. *Lace Curtain, supra*. We affirm those findings and reject BRC's contentions.

## BACKGROUND

In *Seaboard Air Line R. Co. - Merger - Atlantic Coast Line*, 320 I.C.C. 122 (1963) (*SAL - Merger - ACL*), we approved the consolidation of Seaboard Air Line Railroad Company (SAL) and Atlantic Coast Line Railroad Company (ACL), which later became SCL. The approval was subject to the labor protective conditions set forth in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952), as modified in *Southern Ry. Co. - Control Central of Georgia Ry. Co.*, 317 I.C.C. 557 (1962), 317 I.C.C. 729 (1963), and 320 I.C.C. 377 (1964) (*New Orleans*). Following our approval, and pursuant to the provision in former section 5(2)(f), now section 11347, permitting labor protection to be determined by agreement between rail carriers and employee representatives, SAL and ACL entered into the Orange Book agreement with BRC and 16 other unions. Under section 2 of the Orange Book agreement, all SAL and ACL employees were to be hired by SCL and receive so-called "attrition" labor protections. Under these protections, the employees would not be placed in a worse position with respect to compensation, rules, working conditions, fringe benefits, or related rights or privileges for their working lives. In exchange for these protections, SCL was entitled, under section 3(a) of the Orange Book agreement, to transfer the work of employees throughout the consolidated SCL system, and the parties were to enter into implementing agreements providing for the transfer and use of employees and allocation or rearrangement of forces made necessary by changes for which protection was provided.



In *CSX-Control, supra*, we approved CSX Corporation's application to control two non-carrier holding companies, the Chessie System, Inc., and Seaboard Coast Line Industries, Inc. (SCLI). Chessie controlled two major railroads, C&O and the Baltimore and Ohio Railroad (B&O), and SCLI controlled SCL. The railroad subsidiaries remained separate entities.[3] *Id.* at 575. The approval was subject to the so-called *New York Dock* labor protective conditions [*New York Dock Ry. - Control - Brooklyn East Dist.*, 60 I.C.C. 60 (1979)].[4]

On August 29, 1986, CSX/C&O issued written notice to BRC of their intent to close CSX's Waycross car repair facility and simultaneously to transfer the functions of that facility to the C&O's Raceland freight car heavy repair shop. The notice stated that work moved from Waycross would be ". . . coordinated with such work presently being performed at Raceland under the C&O Agreement." Approximately 50 percent of the employees currently occupying positions at the Waycross repair shop would be covered by the Orange Book Agreement.

In their notice, CSX/C&O informed BRC of their intent to abolish 149 positions at Waycross and establish 107 positions at Raceland. BRC represents 121 of the incumbents holding positions slated for abolition. By class, the BRC incumbents are 99 carmen, 4 carmen helpers, 13 painters, and 5 painter helpers. With regard to these classes, CSX/C&O estimated that it would create positions for 96 carmen, 3 carmen helpers, 6 painters, and 4 painter helpers to perform the work transferred to Raceland from Waycross. As to other classes of incumbents at Waycross, CSX/C&O indicated that they would abolish 3 clerical positions, 11 blacksmith positions, 6 laborer positions, 3 machinist

---

[3] On December 29, 1982, SCL merged with the Louisville and Nashville Railroad Company to form the Seaboard System Railroad, Inc. (SSR). On July 1, 1986, SSR changed its name to CSX Transportation, Inc. (CSXT). Subsequently, B&O was merged into C&O, which in turn was merged into CSXT on August 31, 1987. *See* Finance Docket No. 31106, *Chesapeake & Ohio Ry. and CSX Transp., Inc. Merger Ex.* (not printed), served September 18, 1987.

[4] *New Orleans* and *New York Doc* provide similar protections for affected employees and similar dispute resolution remedies, including arbitration.

positions, 4 sheet metal worker positions and 1 electric crane operator position. At Raceland, the carriers intended to establish only 1 clerical, 4 blacksmith and 3 laborer positions. CSX/C&O estimate that, under the arbitration committee's decision prohibiting the transfer of employees subject to the Orange Book Agreement, it could not require 57 Waycross carmen to transfer to Raceland.

After CSX/C&O served the August 29, 1986, notice, the parties conferred at least twice to negotiate an implementing agreement. Their bargaining efforts were unsuccessful, primarily because of disagreements over the application of certain Orange Book provisions, the interrelationship between the Orange Book and a *New York Dock* implementing agreement, and CSX/C&O's right to implement the transaction without first complying with the Railway Labor Act, 45 U.S.C. 151 *et seq.* (RLA). Thereafter, BRC and later CSX/C&O invoked arbitration in accordance with Article 1, section 4(a) of the *New York Dock* conditions and section 4 of the Orange Book agreement.

The arbitration committee found that the repair shop transfer is a transaction subject to the *New York Dock* conditions imposed in *CSX-Control* because the transfer is an action taken pursuant to our control authorization within the meaning of Article I, section 1(a) of *New York Dock*. *See BRC* v. *CSX, supra* at 29-30. The committee derived its authority to impose an implementing agreement for the repair shop transfer under section 4(a) of *New York Dock*, which requires that "any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4." *Id.* at 30. The committee recognized that, because it derived its authority from the *New York Dock* conditions we imposed in *CSX-Control*, it was a quasi-judicial extension of the Commission and therefore bound to follow our pertinent interpretations of the Interstate Commerce Act. *Id.* at 31. The committee then considered the Commission's views on the conflict between (1) the requirement in Article 1, sections 2 and 3, of the *New York Dock* conditions that rights under existing collective bargaining agreements be preserved; and (2) the authority of an arbitrator under Article 1, section 4, of *New York Dock* to authorize reassignment of employees in order to carry out the approved



transaction. The committee found the Commission's view to be that the arbitrator could override provisions in collective bargaining agreements if they conflict with implementation of the transaction. *Id.* at 33. The committee also considered the conflict between the Railway Labor Act's (RLA) extended dispute resolution mechanism for altering agreements and the final and binding effect of arbitration under section 4 of *New York Dock* permitting prompt changes in working conditions. The committee found that RLA procedures were overridden by the *New York Dock* procedures. It relied on expressions of the Commission's views in decided precedent and in Commission pleadings, as well as the exemptive effect of section 11341(a). Accordingly, despite a perceived conflict between the Orange Book agreement and the carrier's proposal, the committee found that it had "jurisdiction to formulate an implementing agreement governing the transfer of work and employees from Waycross to Raceland." *Id.* at 34. This statement that it had the authority to override existing agreements by requiring the work and employees to be moved summed up the committee's view of Commission policy on this issue. It also acknowledged our decisions holding that, under the immunity provisions of 49 U.S.C. 11341(a), implementation of transactions that we authorize under 49 U.S.C. 11343, such as *CSX-Control*, supersede employee protections under the RLA and collective bargaining agreements that conflict with those transactions.[5] *See* Finance Docket No. 30,000 (Sub-No.18), *Denver and Rio Grande Western Railroad Company - Trackage Rights - Missouri Pacific Railroad Company Between Pueblo, CO and Kansas City, MO, et al.* (not printed), served October

---

[5] Section 11341(a), as pertinent, reads as follows:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other laws, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. * * * *

25, 1983, *(DRGW), rev'd sub. nom. Brotherhood of Loc. Engineers v. ICC,* 761 F.2d 714 (D.C. Cir - 1985), *rev'd on other grounds,* ___ U.S. ___ (June 8, 1987); and Finance Docket No. 30532, *Maine Central R.R. Co. Georgia Pacific Corp., Canadian Pacific, Ltd. and Springfield Terminal Ry. Co. - Exemption from 49 U.S.C. 11342 and 11343* (not printed), served September 13, 1985 *(Maine Central), aff'd mem. sub nom. Railway Labor Execs. Ass'n.* v. *ICC,* No. 85-1636 (D.C. Cir. Mar. 16, 1987).

The arbitration committee nevertheless held that the repair shop transfer should "reasonably accommodate" existing collective bargaining agreements and collective bargaining rights as well as existing merger protection agreements. *BRC* v. *CSX, supra,* at 33-34. The committee interpreted section 3(a) of the Orange Book agreement as barring CSX/C&O from transferring Orange Book protected *employees* or their *work* beyond former SCL property. It reasoned that the merging carriers could have foreseen that SCL might later become part of an even larger system. Thus, the drafters of the Orange Book could have easily written terms permitting unrestricted transfers across any enlarged system. *Id.* at 35-36. The committee recognized, however, that under *DRGW,* the Orange Book limitation on the transfer of work must be subordinated to CSX/C&O's right to engage in the authorized *New York Dock* transfer transaction. Otherwise the carriers would be effectively prevented from implementing the repair shop transfer. *Id.* at 36-37. Despite this, however, the committee refused to relieve CSX/C&O from the restriction against transferring Orange Book protected employees beyond SCL property. The Committee found that this limitation would only "slightly impair" the transaction while preserving the essence of the Orange Book Agreement as required under sections



2 and 3 of the *New York Dock* conditions.[6]

CSX/C&O contend that the arbitration committee's Orange Book employee exception may not stand because it conflicts with proper implementation of the repair shop transfer and our consolidation authorization in *CSX-Control.* They also argue that the Orange Book exception is based on a misinterpretation of the Orange Book agreement.

BRC contends that the repair shop transfer is not a transaction contemplated in *CSX Control* and, thus, not authorized under section 11343. Consequently, BRC contends that the arbitration committee exceeded its authority by allowing CSX/C&O to transfer the repair shop work at Waycross to Raceland beyond the SCL system, thus unilaterally abrogating the Orange Book agreement. BRC also argues that, even if the transaction were authorized by *CSX Control,* the committee impermissibly overrode sections 2 and 3 of *New York Dock* which require the preservation of collective bargaining agreements such as the Orange Book.

---

[6] *New York Dock* sections 2 and 3 read as follows:

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; *provided,* that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective condition or arrangement, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, *provided further,* that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

## DISCUSSION AND CONCLUSIONS

The starting point in our review of an arbitration decision is the appropriate standard of review to be applied by us. *See* discussion of these standards in *Lace Curtain,* 3 I.C.C.2d at 735-36, and our recent decision in F.D. No. 28490 (Sub-No. 1), *Atlantic Richfield Company and Anaconda Company - Control - Butte, Anaconda & Pacific Railroad Company* (not printed), served March 2, 1988 *(ARCA)*, slip op. 6-7. A principal reason for starting with the standard of review is that much of our task can be ended there as well. As we indicated in *Lace Curtain,* 3 I.C.C.2d at 735-36, we do not propose to devote significant Commission time or resources to the review of an arbitrator's decision. We will employ an extremely limited standard of review, according substantial deference to the arbitrator's competence and special role in resolving labor disputes and giving a strong presumption of finality to an award. Our deference to the arbitrator's decision will vary with the nature of the issue involved, ranging from the most deferential treatment in the case of evidentiary issues such as causation, *Lace Curtain,* 3 I.C.C.2d at 736, *ARCA* at 9, to significantly less deference when reviewing interpretations of Commissions regulations or orders and matters of transportation policy. *Id.*

Applying these standards to this case, we accord substantial deference to the arbitration committee's causual determination that the Waycross-Raceland transfer is a transaction authorized by the Commission's approval in *CSX-Control. BRC* v. *CSX* at 33. *Cf. ARCA* at 8-10. The Committee applied the proper standards in arriving at the determination, *BRC* v. *CSX* at 29-33, and we decline to re-examine it. Accordingly, the arbitration committee also properly determined that the *New York Dock* conditions imposed by us in *CSX-Control* are applicable to employee dislocations caused by the Waycross-Raceland transfer.

Having found that the *New York Dock* conditions apply, the next major task for the committee was to explore the relationship between the absolute authority given the committee by section 4 of those conditions to effect changes in work and employee assignments through the implementing agreement, on the one hand, and, on the other, the preservation of collective bargaining agreements and rights (including Orange Book



rights) under sections 2 and 3 of those conditions and the dispute resolution procedures under the Railway Labor Act. The committee recognized that its views on this issue, a significant question of interpretation of a Commission order and policy, were entitled to no deference upon review by this Commission. This is evident when it stated (p. 31), "as a quasi-judicial extension of the ICC, this committee must strictly follow the ICC's interpretation of its own authority." As we have described above (p.4), the committee found that it was empowered to override collective bargaining rights, such as those in the Orange Book, and RLA rights in formulating the implementing agreement. Believing it was reflecting the Commission's views, the committee concluded it had the authority to move both work and employees to Raceland, despite potentially conflicting provisions in the RLA and the *New York Dock* conditions themselves ("the ICC has emphasized that a transaction hurdles all legal obstacles preventing implementation," award at 34). This is a correct statement of our position and we affirm the committee's finding on its authority.

The committee went on, however, to contradict its own statements and imposed a significant, if not insurmountable, obstacle to implementation of the transfer by prohibiting the reassignment of SCL employees to Raceland. This decision of the committee rests on an interpretation of the Commission's conditions and is a matter of Commission policy. As such, it is not entitled to deference. We find its ruling on this issue to be "egregious error," *Lace Curtain,* 3 I.C.C.2d at 735, and accordingly reverse the committee and remand the proceeding to them for further proceedings in accordance with this decision. While finding that the Orange Book provision on transfer of work "must be subordinated to the Carrier's right" to carry out the authorized transaction (pp. 36-37), the committee inconsistently, we believe, failed to give the same effect to the limitation on transfer of workers contained in the same provision. On its own, the committee fashioned a standard of "slight impairment of the transaction" (p. 37) for permitting a provision of a collective bargaining agreement to conflict with the implementation of an approved transaction, contradicting the ICC standard given by the committee at p. 34. The standard applied by the committee would effectively undercut the Commission's authorization of the

transaction here. As we will discuss below, we cannot affirm the committee on this issue.

As we indicated, even if the committee did properly interpret the Orange Book as prohibiting the transfer of employees outside former SCL limits, its attempted "accommodation" of this supposed prohibition to the proposed transaction must be overturned because the Orange Book agreement as interpreted by the committee serves as an impediment to implementation of a transaction authorized by the Commission. Once it is determined that a proposed transaction is authorized by the Commission (and we have affirmed the committee's finding that this transfer of repair work was authorized in *CSX-Control*), the carrier is permitted to carry out and fully implement the transaction despite potential impediments in existing agreements upon compliance with the provisions for the protection of the rights of employees contained in *New York Dock* or imposed by the Commission upon the involved transaction. As the committee found, and we agree, it has the authority to override these obstacles in the implementing agreement it will fashion. As a matter of Commission policy and as an interpretation of our conditions, we are constrained to overturn the decision to the extent it holds that CSX may not require transfer of SCL employees as well as work from Waycross to Raceland. Such transfers are of course subject to the terms set forth in *New York Dock* for the protection of the interests of affected employees.

In any event, the evidence does not support the committee's conclusion that a prohibition against transfer of Orange Book protected employees will only "slightly impair" the implementation of the repair shop transfer. The record shows that CSX/C&O is consolidating its heavy car repair operations at Raceland because of significantly reduced work and the need commensurately to reduce its repair operations to realize cost savings and operational efficiencies. The unrebutted evidence shows that CSX/C&O propose to establish a total of 107 positions at Raceland, including 86 carmen positions. Of the 86 Waycross carmen who are eligible for those positions, 57 are entitled to Orange Book protection. Under the arbitration committee's construction of the Orange Book, those 57 Waycross employees (over 55 percent of the proposed Raceland work force) can refuse



to accept positions at Raceland. In support of its refusal to supersede the construed Orange Book prohibition, the arbitration committee concluded (*BRC* v. *CSX*, at p. 37), that some of those employees could exercise seniority to remaining positions at Waycross. However, the carriers state that, after the transfer of work, there will be no existing positions at Waycross to which these 57 carmen can exercise seniority to fill. Imposition of an Orange Book employee exception would effectively prevent implementation of the proposed transaction. We need not speculate on precisely what amount of interference with implementation of an authorized transaction is permissible. The interference here is too great.

This action will not significantly affect either the quality of the human environment or energy conservation.

*It is ordered:*

1. The opinion and award in *BRC* v. *CSX* is affirmed in part and reversed in part as described in this decision. It is remanded to the arbitration committee for further proceedings consistent with this decision.

2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Commissioner Lamboley dissented and will submit a separate expression at a later date.

Noreta R. McGee
Secretary

(SEAL)

**COMMISSIONER LAMBOLEY,** dissenting:

This is one in a series of three recent cases involving Commission review of arbitration awards.[1] In each case I find myself at odds with the majority's disposition.[2] I am concerned that we may becoming result-oriented in our review of awards, notwithstanding Commission standards applicable to the limited scope of deferential review.[3]

The present case involves an arbitration proceeding allegedly undertaken pursuant to the jurisdictional authority of the protective conditions imposed in the 1980 *CSX Corp. - Control - Chessie and Seaboard Co. L.I.* case.[4]

A close reading of the underlying *CSX-Control* case leaves substantial doubt whether there is any proximate nexus between the control transaction approved by the Commission and the transaction here at issue occurring some seven years later.[5]

---

[1] See FD No. 29430 (Sub-No. 20), *Norfolk Southern Corp. - Control - Norfolk & Western Ry. Co. and Southern Ry. Co.*, (not printed), served June 10, 1988, (*NS-Arb*); FD No. 28583 (Sub-No. 24), *Burlington Northern, Inc. - Control & Merger - St. Louis - San Francisco Ry. Co.*, (not printed), served June 23, 1988. (*BN-Arb*)

[2] In *NS-Arb* the majority affirmed an award terminating employee RLA representation rights to effect a transfer, and in *BN-Arb*, the majority reversed and dismissed a proceeding concluding there was no jurisdiction for the award under previously imposed merger conditions.

[3] See *Chicago & Northern Western Trans. Co. - Abandonment* 3 I.C.C. 729 (1987) (aka *Lace Curtain*); FD No. 28490 (Sub-No. 1), *Atlantic Richfield Co. and Anaconda Co. - Control - Butte Anaconda & Pac. R.R. Co.*, (not printed), served March 2, 1988 (*ARCO/BAP*).

[4] 363 ICC 521 (1980) (*CSX Control*).

[5] Issues of proximate nexus and causation are discussed in *Southern Ry Co. - Control - Central Georgia Ry Co.*, 317 I.C.C. 729 (1963) aff'd *sub. nom. RLEA v. U.S.* 266 F. Supp. 521 (ED. VA. 1964) vac'd other grounds 379 U.S. 199 (1984), *Leavens v. Burlington Northern, Inc.* 348 I.C.C. 962 (1977). See also recent arbitration review cases *ARCO/BAP, supra BN-Arb, supra* and *NS-Arb, supra*, (also my dissent in *NS-Arb*).



In my view, causation presents a substantial jurisdictional issue in this case.[6] I believe our remand does not include appropriate instructions to guide the panel on rehearing.

From the outset, the basic question whether the arbitration panel has requisite subject matter jurisdiction has been vigorously disputed by BRC. However, the panel in its award finds and concludes it has requisite jurisdiction based upon the parties *concurrence*.[7] Quite apart from considering whether jurisdiction can be obtained by stipulation, the panel's determination on that point is simply contrary to record fact.

The essence of the BRC argument, both before the arbitration panel and the Commission, is that while transfer of work may be a transaction that customarily falls within the scope of *NY Dock* conditions, subject matter jurisdiction depends on whether a particular transfer has a proximate or causal relationship to the underlying *control* transaction to which the conditions apply.[8] Thus, despite the fact that BRC generally "concurs" that a transfer transaction may be within *NY Dock* conditions, it contends this specific transaction is not because there is no proximate linkage to the transaction originally approved in the *control* case on which the conditions were imposed. Therefore, if the transfer is outside the scope of the approved transaction in *CSX-Control*, there is no requisite subject matter jurisdiction for these arbitration proceedings.[9]

A critical reading of the underlying *control* case casts serious doubt on a favorable finding of causation necessary to include this transfer transaction within the scope of the original transaction and its conditions. Nowhere in *CSX Control* was there

---

[6] *Cf. BN-Arb, supra.* Our jurisdictional authority for review here is not at issue.

[7] *Award*, p. 29.

[8] See *BRC* Pre-Hearing Submission, Post-Hearing Submission, and Opinion of dissenting panel member to Award; Answer and Cross complaint for review.

[9] See *Southern Ry. Co., supra; BN-Arb supra*, also 49 U.S.C. §§11341(a), 11343.

any hint or suggestion that the Waycross-Raceland transfer was, immediately necessary, or in the future, could reasonably be anticipated as a subsequent event directly resulting from control. Indeed, the contrary would be a more ready conclusion.

In reviewing public benefits anticipated from various aspects of the control transaction, no mention is made of consolidation of heavy equipment repair at any location(s) within or between the systems to be controlled. The control transaction expressly contemplates control not merger, and continued operation of the individual railroads as separate corporate entities within each of the Chessie and SCLI rail systems. "Control" in the original transaction was little more than authority to coordinate the operations of two systems for purposes of achieving expanded "single system", but not "single line service."[10]

Anticipated impact on employees, in the control transaction was not regarded as significant. Dislocations were to be "short-lived" and expected to "occur within six months following final approval." Further, "perceptible" dislocations were possible "only at points where the basically end-to-end systems meet" to mesh for coordination of operations and which points were "clearly identified.".[11]

Interestingly, the Raceland facility is specifically mentioned, but only with reference limited to the creation of additional, new jobs resulting from increased production of railcars at that facility, not transfer of repair work.[12]

As a matter of procedure, the failure to include transfer of work to the Tampa facility to the company's NOTICE while possible error, in the circumstances of this case cannot be considered prejudicial. BRC had fair opportunity to address the issue. However, the panel's failure to include Tampa and consider the Waycross-Raceland-Tampa relationship may have arguably impacted a residual number of employees at Waycross without

---

[10] *CSX Control supra*, pp 533, 553-556, 575-576.

[11] Id., at pp. 588-589.

[12] Id., at pp. 588-589, 641.



apparent work to perform, at a time when the company reasonably anticipated transferring to Tampa, work previously planned for Waycross in 1987.[13]

Finally, the majority attempts to establish the proposition that *any* conflict, regardless of origin or degree, is an impediment pre-empted by ICA provisions.[14] In my view, this represents a continuing effort to modify Commission precedent and runs contrary to existing judicial precedent.

Such precedent finds that Section 11341(a) is not absolute in its terms or in its operation; nor is it necessary that it be so in order to effect approved transactions. In a voluntary merger proceeding, the Supreme Court has held that once conditions requisite for approval have been satisfied, the Commission-approved transaction is self-executing, and further found that:

> "the parties are relieved of 'restraints limitations and prohibitions of law, Federal, State, or municipal' *insofar as may be necessary to enable them to carry into effect the transaction so approved.*" (emphasis added)[15]

The Court has also found that a "to the extent necessary" determination for exemption purposes does not require the Commission to contemplate unforeseeable legal obstacles or enumerate every legal obstacle that is waived.[16]

---

[13] See *Award*, Carrier Members Reply to Dissent.

[14] 49 U.S.C. §11341(a).

[15] *Schwabacher v. U.S.* 334 U.S. 182 (1948) (construing Section 5(11), predecessor to Section 11341).

[16] See *County of Marin v. United States*, 356 U.S. 412 (1958).

Courts of Appeal reviewing Commission decisions have likewise required a "to the extent necessary" showing for pre-emption purposes.[17]

For its part, the Commission has historically taken the position that it will limit its review of issues involving application and interpretation of merger conditions. Moreover, in discussing this role, the Commission has clearly emphasized the beneficial purpose of protective conditions and the positive contribution found in accommodating the policies of the ICA and the RLA.

In *Leavens v. Burlington Northern*,[18] concluding its scope of review should be limited, the Commission held:

> "Our review should be limited to those matters that either result from the merger or which claim violation of a specific merger-related harm." Obviously, we would review such allegations only to determine whether or not the carrier has failed to implement the protections we recognized for adversely affected employees."[19]

---

[17] See *Texas & New Orleans R. Co. v. Bhd. of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962) *cert. den.* 952 U.S. 934 (1963), *City of Palestine, Texas v. U.S.*, 559 F.2d 408 (5th Cir. 1977) *cert. den.* 435 U.S. 950 (1978). Also, FD No. 30000 (Sub-No. 18), *Denver & Rio Grande Western R. R. Co. - Trackage Rights Between Pueblo Co. and Kansas City, MO. (DRGW)* (not printed) (served October 19, 1983; *rev'd, sub. nom., BLE v. I.C.C.*, 761 F.2d 714 (D. C. Cir. 1985) rev'd on other grounds ___ U.S. ___ (June 8, 1987) Cf. *BLE v. CNW*, 314 F.2d 424 (8th Cir. 1962), *cert. den.* 375 U.S. 819 (1963).

[18] *Leavens, et al. v. Burlington Northern, Inc.* 348 I.C.C. 962 (1977).

[19] Id. at p. 975. This limited role was recently reaffirmed in FD No. 40074, *UTU v. Burlington Northern R. Co. and Houston Belt & Terminal Ry Co.* (not printed), served March 30, 1987). (The Commission stating: "It is clear that we have jurisdiction over those labor matters which stem from the conditions we adopted at the time the merger was authorized.") See also, FD No. 21478 (Sub-No. 7), *Great Northern Pac. & Burlington Lines, Inc. - Merger - Great Northern Ry, (Arco)* (not printed), served March 16, 1987). But see: FD No. 21478 (Sub-No. 6), *Great Northern Pac. & Burlington Lines, Inc. - Merger - Great Northern Ry, (Landis)* (not printed), served December 11, 1986.



Commenting on the special relationship between protective conditions, collective bargaining, and arbitration, the Commission observed:

> "However, in dealing with these protective conditions, the Commission is faced with a special problem - defining the extent of our ongoing responsibility to consider alleged breaches of the protective conditions for which an arbitration remedy is provided. In adopting these protective conditions and the related arbitration provisions, we provided that those who were most familiar with the complexities of labor law and the peculiar problems associated with railroad employees would determine disputes arising out of such conditions. This Commission did not intend to place itself in the fields of collective bargaining or labor management relations nor do the provisions of the Interstate Commerce Act require it. We should be careful so that we do not, because of lack of expert competence, contravene the national policy as to labor relations."[20]

Emphasizing the need to accommodate the respective policies of the ICA and RLA, the Commission stated:

> "Our responsibility to impose protective conditions in a merger was not meant to give the Commission a right to interfere in the normal give and take of collective bargaining.
>
> "'The policies of the Interstate Commerce Act and the labor act necessarily must be accommodated one to the other.' (citation omitted).
>
> We feel that in making the accommodation this Commission should undertake to enforce these protective conditions only to the extent stated above, i.e., to the extent that affected employees have suffered harm in violation of the adopted conditions as a result

---

[20] Ibid.

> of the transaction or to the extent that a specific condition intended to protect against a specific harm that would result from the merger."[21]

More recently, the Commission has stated:

> "As UTU notes standard labor protective conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our revision authorizing the involved transaction and the underlying statutory scheme. *To the extent* that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give to the implementation of the transaction." (emphasis added.)[22]

In my view, the majority decision here seeks to enhance the dicta of *Maine Central*[23], further narrow the qualifying language of *DRGW* and ignore judicial precedent in pursuit of what I fear may be a goal to pre-empt application of all other laws, and at the same time, consistently deny the consideration of protections and remedies those laws provide. I continue to subscribe to the view that definition and accommodation of conflict, where possible, are more appropriate in dispute resolution proceedings.[24] To that end, I am inclined to accord substantial deference to labor arbitration proceedings.

---

[21] *Id.* at p. 976.

[22] *DRGW, supra* also *NS-Arb, supra*. Earlier, the Commission had observed that it may nullify only those restraints that are "materially related" to a proposed merger or consolidation. See *Missouri Pac. R. Co. - Merger*, 354 I.C.C. 763 (1978) (commenting on *City of Palestine* decision.

[23] FD No. 30532, *Maine Central R. Co., et al. - Exemption from 49 U.S.C. §§1342 and 11343* (not printed), served September 13, 1985 *aff'd mem., sub. nom. RLEA v. I.C.C.*, 812 F.2d 1443 (D.C. Cir. 1987).

[24] See my separate expessions *NS-Arb supra, BN-Arb supra* and FD No. 30853, *Rowlett v. Missouri Pacific R. Co.*, (not printed), served August 19, 1987.



## ARBITRATION COMMITTEE

**In the Matter of the Arbitration Between:**

**BROTHERHOOD RAILWAY CARMEN - A DIVISION OF BRAC,**

*Organization,*

*and*

**CSX TRANSPORTATION, INC. and THE CHESAPEAKE and OHIO RAILWAY COMPANY,**

*Carriers.*

OPINION AND AWARD

Pursuant to Article I, Section 4 of the New York Dock Conditions and Section 4 of the November 3, 1966 Merger Protective Agreement

I.C.C. Finance Docket No. 28905

Hearing Date: December 18, 1986
Hearing Location: Jacksonville, Florida

## MEMBERS OF THE COMMITTEE

Employees' Member: R. P. Wojtowicz
Carriers' Member: J. T. Williams
Neutral Member: John B. LaRocco

## APPEARANCES

For the Organization:

WILLIAM G. MAHONEY, ESQ.
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 Seventeenth Street, N.W.
Washington, D.C. 20036

MR. L. W. MCALPINE, JR.
General Chairman
Brotherhood Railway Carmen
P. O. Box 3744
Savannah, Georgia 31404

MR. R. UTTER
General Chairman
Brotherhood Railway Carmen
57 McKinley Street
Toledo, Ohio 43605

For the Carrier:

JAMES S. WHITEHEAD, ESQ.
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603

JAMES D. TOMOLA, ESQ.
General Attorney
CSX Transportation, Inc.
100 North Charles Street
Baltimore, Maryland 21201

## OPINION OF THE COMMITTEE

### I. INTRODUCTION

On September 23, 1980, the Interstate Commerce Commission (ICC) approved CSX Corporation's petition to control two non-carrier holding companies: Chessie System, Inc. and Seaboard Coast Line Industries, Inc. ICC Finance Docket No. 28905 (Sub-No. 1). 363 I.C.C. 521 (1980). The Chesapeake and Ohio Railway Company (C&O) and the Baltimore and Ohio Railroad Company (B&O) are the major railroad subsidiaries of Chessie System, Inc. In 1980, Seaboard Coast Line Industries, Inc. was the parent of the Family Lines which included the Seaboard Coast Line Railroad (SCL). The successor enterprises of the Family Lines were Seaboard System Railroad and currently CSX Transportation, Inc. (CSX). The end to end consolidation produced a large single system serving the northeast, southeast and midwest. *Id.* at 553. The railroad subsidiaries remained separate entities. *Id.* at 575. To compensate and protect employees adversely affected by the control case and related proceedings, the ICC imposed the employee merger protection conditions set forth in *New York Dock Railway - Control - Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 84-90 (1979); affirmed, *New York Dock Railway v. United States*, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on all of the involved railroads pursuant to the relevant enabling statute. 49 U.S.C. 11343, 11347; 363 I.C.C. 521, 588.

In 1966, the ICC approved the merger of the Seaboard Air Line Railroad Company (SAL) and the Atlantic Coast Line Railroad Company (ACL). The merged carrier became the SCL.

On November 3, 1966, the Brotherhood Railway Carmen (BRC) and sixteen other rail labor organizations entered into an Agreement with the SAL and ACL for the Protection of Employees in the Event of the SAL-ACL Merger. The Agreement, commonly referred to as the



Orange Book, was effective August 1, 1966. The parties negotiated the Orange Book pursuant to the last sentence of Section 5(2)(f) of the Interstate Commerce Act. In 1978, Congress enacted 49 U.S.C. 11347 and repealed Section 5(2)(f).

### II. BACKGROUND AND SUMMARY OF THE FACTS

CSX and C&O (collectively "the Carriers") issued written notice, dated August 29, 1986, of their intent to close CSX's freight car heavy repair shop at Waycross, Georgia and to simultaneously transfer " . . . freight car heavy repair work and certain storeroom work at Waycross . . . " to the C&O's Raceland, Kentucky freight car heavy repair facility. The work moved from Waycros would be " . . . coordinated with such work presently being performed at Raceland under the C&O Agreement." The repair work and Waycross employees are presently subject to the SCL Schedule Agreement. Approximately fifty percent of the employees currently occupying positions at the Waycross repair shop are present employees within the definition set forth in Orange Book Section 2(a).

In their notice, the Carriers informed the Organization of their intent to abolish 149 positions at Waycross and establish 107 positions at Raceland. The Organization represents 121 of the incumbents holding positions slated for abolition. By class, the incumbents are 99 Carmen, 4 Carman Helpers, 13 Painters and 5 Painter Helpers. At the coordinated Raceland facility, the Carriers estimated that they would create 86 Carmen, 3 Carman Helper, 6 Painter and 4 Painter Helper positions to perform the work transferred from Waycross. Except as described above, the notice was silent concerning the 22 workers whose positions would be abolished but would be unable to either obtain an equivalent, newly established Raceland position or exercise their seniority to claim a remaining position at Waycross. The Carriers anticipated that they would close

the Waycross freight car heavy repair shop on or about December 31, 1986.

The notice also indicated that CSX would abolish 3 clerical positions, 11 jobs in the blacksmith's craft, 6 laborer positions, 3 Machinist positions, 4 jobs held by sheet metal workers and 1 electric crane operator position. At Raceland, the Carriers intended to establish only 1 clerical, 4 blacksmith and 3 laborer positions.

After the Carriers served the August 29, 1986 notice, the parties conferred at least twice to negotiate an implementing agreement. Their bargaining efforts were unsuccessful primarily because irreconcilable disagreements developed over the application of certain Orange Book provisions, the interrelationship between the Orange Book and a New York Dock implementing agreement and the Carriers' right to implement the transaction without first complying with the Railway Labor Act. 45 U.S.C. 151 *et seq*. Thereafter, the Organization, and later the Carriers, invoked arbitration in accord with Section 4(a) of the New York Dock Conditions.[1] Even though Section 4 contemplates arbitration by a single, neutral arbiter, the parties formed this Committee to resolve all outstanding disputes under the New York Dock Conditions and the Orange Book. Thus, we derive dual authority from Section 4 of the New York Dock Conditions and Section 4 of the Orange Book.

Beginning on November 4, 1986, the Organization challenged the jurisdiction of this Committee to fashion an implementing agreement. Despite its prior invocation of arbitration, the Organization may nonetheless contest our fundamental power to adjudicate this dispute. A lack of jurisdiction allegation may be raised at any time.

---

[1] All sections pertinent to this case are found in Article I of the New York Dock Conditions. Thus, the Committee will only cite the particular section number.



Therefore, the Organization is not estopped from urging this Committee to dismiss all the substantive matters which the parties previously agreed to submit to us.

The Organization and the Carriers filed prehearing submissions and extensively argued their respective contentions at the December 18, 1986 hearing. Also, they filed post-hearing briefs which the Neutral Member received on January 2, 1987. This decision was issued within the thirty day limitation period found in Section 4(a)(3) of the New York Dock Conditions.

## III. STATEMENT OF THE ISSUES

The Carriers pose the following question to this Committee:

> "Shall the terms of the attached agreement, proposed by the Carriers, apply to the implementation of the Carriers' August 29, 1986 notice to transfer all freight car heavy repair work from Waycross, Georgia to Raceland, Kentucky and to coordinate such work with that presently being performed at Raceland under the C&O Agreement?"

The "attached agreement" referred to in the Carriers' question at issue is a proposed implementing agreement which it sent to the Organization on October 15, 1986. The Carriers withdrew all their prior proposals.

In its opening submission, the Organization proffered four issues which read:

> "ISSUE NO. 1:
>
> "Is the CSX's notice dated August 29, 1986 (attached as Exhibit No. 1), concerning transfer of freight car heavy repair work from Waycross, Ga. on the SCL to Raceland, Ky. on the C&O adequate and specific enough notice under the *New York Dock* conditions?
>
> "ISSUE NO. 2:
>
> "If this arbitrator has jurisdiction of this dispute, can the affected employees who have lifetime

guaranteed jobs on the SSR under the Orange Book agreement–which gives the SSR the right to transfer work and employees only from their home point to other points on the former SAL-ACL railroads–be compelled to transfer to another point on another railroad which is not on the property of the former SCL and ACL railroads without unilaterally effecting a change in their wages, rules or working conditions as set forth in the Orange Book?

"ISSUE NO. 3:

"Can CSX move the work which is subject to the SCL (SSR) Working Agreement and restricted to the SCL employees, out from under the SCL agreement and place it under another contract (Working Agreement) on another railroad?

"ISSUE NO. 4:

"If the above issues each are answered in the affirmative, what should be the terms of an implementing agreement under Article I, Section 4 of *New York Dock*?"

In addition, the Organization's General Chairman on the C&O raised another issue although the question is actually a subset of the above stated fourth issue. The C&O General Chairman presented the following question:

"Shall the C&O employees, junior in seniority to employees transferring from Waycross, Georgia, corresponding [sic] to the number of senior employees transferring to the coordinated operations, be subject to the protective benefits set forth in Article 5 and 6 of the New York Dock Conditions?"

## IV. RELEVANT STATUTES, ORANGE BOOK PROVISIONS, EXCERPTS FROM NEW YORK DOCK CONDITIONS AND RECENT COURT DECISIONS

To fully understand the parties' contentions, we must first relate the relevant statutes, contract provisions and legal authority.



The ICC promulgated and imposed the New York Dock Conditions pursuant to the Congressional mandate in Section 11347 of the Interstate Commerce Act. 49 U.S.C. 11347. Starting with Section 1(a), a transaction is "... any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." Section 4(a) states that "... any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or [arbitrator's] decision under this section 4." [Brackets added for clarification.] 360 I.C.C. 85. Assuming we have jurisdiction, Section 4 empowers this Committee to write an implementing agreement providing for "... the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case ... " *Id.* Also, Section 4 requires the Carriers contemplating a transaction to issue a notice containing "... a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes." With regard to its jurisdictional challenge, the Organization relies heavily on Sections 2 and 3 of the New York Dock Conditions. These two sections state:

"2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

"3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; *provided*, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective

conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; *provided further*, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, *provided further*, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement."

Section 3 (a) of the Orange Book reads:

"*In consideration of the foregoing employee benefits the Merged Company shall*, subject to compliance with the provisions of Appendix F attached hereto, *be entitled to transfer the work of the employees protected hereunder throughout the merged or consolidated system and the labor organizations will*, subject to provisions contained in the Memorandum of Understanding attached hereto as Appendix G, *enter into implementing agreements providing for the transfer and use of employees and allocation or rearrangement of forces made necessary by changes for which protection is herein provided* and the employees, their organizations and the Carriers will cooperate to that end." [Emphasis added.]

The pertinent portion of Section 11341 (a) of the Interstate Commerce Act provides that a carrier or person participating in an approved transaction " . . . is exempt from the antitrust laws and from all other law . . . as necessary to let that person carry out the transaction . . . " 49 U.S.C. 11341(a). In *Denver and Rio Grande Western Railroad Co. - Trackage Rights - Missouri Pacific Railroad Co.*, Finance Docket No. 30000 (Sub-No. 18) (October 19, 1983) (unreported) ("the *DRGW* Case"), the ICC interpreted the



scope of its Congressionally delegated authority pursuant to Section 11341 (a). The Commission asserted: "Our approval exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the . . . " Railway Labor Act. *DRGW* at 5. The ICC observed that if its approval of a transaction " . . . did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring a change in working conditions of any employees would be substantially nullified." *DRGW* at 6. The ICC ruled that a duly approved trackage rights agreement containing crew assignments was paramount to conflicting terms in the schedule labor agreements.

The District of Columbia Circuit Court of Appeals reversed the ICC's decision. *Brotherhood of Locomotive Engineers v. Interstate Commerce Commission*, 761 F.2d 714 (D.C. Cir. 1985); cert. granted _ U.S. _ (1986). While recognizing that Congress granted the ICC broad powers to exempt transactions from legal obstacles, the Court ruled that the ICC must justify the exercise of its statutory authority. The case is currently pending before the United States Supreme Court.

## V. THE POSITIONS OF THE PARTIES

### A. The Organization's Position on Jurisdiction

The Organization strenuously argues that we lack jurisdiction to fashion an implementing agreement which changes the rules and working conditions in existing collective bargaining and job security agreements. Section 2 of the New York Dock Conditions bars the Carriers from utilizing the compulsory interest arbitration mechanism in Section 4 to remove either employees or work from the SCL Agreement and place the work or workers under the C&O agreement without exhausting the notice and collec-

tive bargaining requirements in the Railway Labor Act. 45 U.S.C. 151, 156. Neither the ICC nor a Section 4 arbitrator can bind the Organization absent its consent.

The Organization reviewed the history of employee protection in the railroad industry. The historical record evinces a consistently strong public policy favoring employee protection as the consequence of streamlining the national rail transportation network. The Organization emphasizes that the New York Dock Conditions, like all employee protective arrangements, are imposed on carriers for the sole benefit of their workers. If Section 4 of the New York Dock Conditions becomes a subterfuge for inflicting mandatory, binding interest arbitration on employees and their representatives contrary to Sections 6 and 7 of the Railway Labor Act, the employee protection is irrationally twisted into a formidable weapon for, instead of an obligation on, rail carriers. Railroads will routinely resort to Section 4 to unilaterally fix rates of pay, rules and working conditions. Needless to say, such a result compoletely undermines collective bargaining. Pursuant to express statutory provisions, interest arbitration in the railroads has always been voluntary. 45 U.S.C. 157, First. Arbitrators acting under the ICC's New York Dock Conditions lack the power to change or vitiate existing labor contracts.

Before and immediately after the formulation of the New York Dock Conditions, the ICC and arbitrators uniformly ruled that they lacked jurisdiction to alter the terms of collective bargaining agreements within the context of promulgating an implementing agreement to govern the effectuation of an ICC approved transaction. *NW/IT v. RYA/UTU*, NYD § 4 Arb. (Sickles, 1981); *NW/IT v. BLE/UTU*, NYD § 4 Arb. (Zumas, 1982); *NW/IT v. UTU*, NYD § 4 Arb. (Edwards, 1981); and *B&O v. BMWE*, NYD § 4 Arb. (Seidenberg, 1983). Any other outcome would render Section 2 of the New York Dock Conditions



meaningless. More particularly, the ICC never claimed authority to indefinitely supersede the Railway Labor Act far into the future merely because it, at one time, imposed employee protective conditions on a railroad. *Southern Railway Co. - Control - Central of Georgia Railway Co.*, 331 I.C.C. 151, 169-170 (1967); and *Texas and New Orleans Railroad Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962). After the ICC's decision in the *DRGW* case, arbitrators overruled the prior line of decisions and held that they had authority to amend or nullify collective bargaining agreements and, in the extreme, to change representation. The issue is before the Supreme Court. At the specific request of the carrier-applicants in the *DRGW* case, the ICC expressly approved a trackage rights agreement containing crew assignment provisions at odds with existing collective bargaining agreements. In its brief to the Court, which is the ICC's latest pronouncement on its exemption authority, the ICC limited its claimed preemption over the Railway Labor Act. In footnote 17 on page 25 of its opening brief, the Commission wrote, "The Section 11341 (a) exemption applies, of course, to terms comprehended by the Commission's approval order." So, the ICC has now informed the Supreme Court that it seeks to supersede the Railway Labor Act only to the extent that it approved specific, future projects which the carrier-applicants presented to it during the course of the administrative proceeding. The transfer of work and workers from Waycross to Raceland was not placed before the ICC as part of the control application. On the contrary, the ICC, relying on the Carriers' representations, opined that the merger of the two holding companies would cause only short-lived employee displacements. 363 I.C.C. 521, 589. The ICC observed that, "It is anticipated that all changes in employee positions will occur within 6 months following final approval of the applications." *Id.* Again, the Carriers led the ICC to believe that "perceptible dislocations" will be necessary only "... at points where the ... end-to-end systems meet ... " Waycross is approximately 600 miles

from Raceland and almost 500 miles from the nearest C&O point. Without doubt, the ICC did not foresee the Carriers' misguided attempt to coordinate work at two distant shops on two separately operated rail subsidiaries. The Carriers conveniently ignore the differences between the merger of two holding companies and the full scale merger of the subsidiaries. Since the subsidiaries are separate companies, the Carriers may only effect their proposed coordination pursuant to the terms of the Washington Job Protection Agreement. Inasmuch as the Carriers did not present the instant coordination to the ICC, jurisdiction accrues to this Committee only after the Carriers fully comply with the Railway Labor Act.

Similarly, this Committee may not entertain any changes in the Orange Book inasmuch as that merger protective agreement vests covered employees with lifetime employment on the former SCL property. Section 3 of the New York Dock Conditions absolutely preserves workers' rights and benefits under existing protective agreements. The ICC has never even hinted that its approval of a transaction abrogates prior employee protective contracts especially when those agreements, like the Orange Book, were negotiated in conjunction with the ICC's imposition of employee protection as a condition precedent to consummating an earlier merger. Since the ICC has never ruled that its orders prevail over the types of contracts listed in Section 3 of the New York Dock conditions, the Carriers cannot use Section 4 to compel the BRC to surrender Orange Book benefits.

Finally, the Organization may, at its discretion, negotiate implementing agreements which modify existing agreements. The Carriers cannot force the Organization to change the existing collective bargaining agreements in this case merely because, a few times in the past, the Organization voluntarily reached implementing agreements with the Carriers.



Raising an alternative jurisdictional consideration, the Organization avers that the Carriers' August 29, 1986 correspondence failed to satisfy the Section 4 notice requirements for two reasons. First, the notice was vague as to both employees and work. The notice failed to describe exactly what freight car heavy repair work was going to Raceland. Although the Carriers were creating 22 fewer positions at Raceland than they were eliminating at Waycross, they did not give any indication as to the status of the 22 employees who would be detrimentally affected by the transaction. Second, BRC's C&O General Chairman was skeptical of the Carriers' estimated need for 99 Raceland positions to perform the work moved from Waycross. Furthermore, he was particularly wary of the Carriers' intent to bring more employees into Raceland inasmuch as the C&O furloughed more than 200 Raceland Carmen on November 28, 1986. An improper Section 4 notice deprives this Committee of jurisdiction and the case must be dismissed. The Carriers must initiate the Section 4 process *de novo*, by tendering a new notice which fully and adequately describes their proposed changes including an accurate estimate of workers needed to perform the transferred work.

### B. The Carriers' Position on Jurisdiction

At the onset, the Carriers underscore the rational business purpose of the coordination. Shippers' demand for conventional type freight cars is diminishing. They are opting for privately owned cars or intermodal equipment. While Raceland Shop is plagued with excess capacity, the Waycross facility lacks the space to assume repair work from Raceland unless CSX expends enormous sums to expand and renovate the plant. Since both shops will not be needed in the future, the Carriers chose to close the Waycross repair facility and transfer the work to Raceland.

During oral argument, the Organization conceded that the planned Waycross-Raceland coordination was a trans-

action within the ambit of the New York Dock Conditions. Admittedly, the Carriers did not specifically present the instant coordination to the ICC but all parties as well as the ICC realized that the railroads might engage in transactions other than those alluded to in their initial operating scheme long after the ICC's omnibus approval of the control application. The Commission remarked that it is "... possible that as the two systems mesh their operations, additional coordinations may occur that could lead to further employee displacements." 363 I.C.C. 521, 589 (1980). In his affidavit, the General Counsel of the Brotherhood of Maintenance of Way Employees realized that approval would eventually permit extensive future changes not needing ICC approval. The Commission responded to labor's concerns by imposing the New York Dock Conditions on each and every transaction. As the ICC found, the "... conditions will adequately protect those employees now identified as affected by the consolidation as well as those who may be affected in the future, but are not now identified specifically." *Id.* Most importantly, the ICC concluded that the operation of a single system would permit the Carriers to reap operating and cost efficiencies including the alleviation of excess capacity at the C&O's Raceland facility. *Id.* at 538 and 561.

The Organization's position that this Committee lacks jurisdiction to formulate an implementing agreement covering the coordination of work between Waycross and Raceland is inconsistent with its past participation in consolidations which the Carriers undertook pursuant to the control case and in accord with arbitrated implementing agreements. See *BRC v. B&O*, NYD § 4 Arb. (Fredenberger, 1984); *C&O v. BRC*, NYD § 4 Arb. (Marx, 1984); and *BRC v. B&O*, NYD § 4 Arb. (Fredenberger, 1983). Jurisdiction was not an issue in any of these three prior Section 4 arbitrations manifesting the Organization's recognition that the sole purpose of Section 4 is to procure an implementing agreement covering the transaction.



The jurisdictional issue presented to this Committee is not a question of first impression. Many respected neutrals have ruled that, under Section 4 of the New York Dock Conditions, an arbitrator has the power to issue an implementing agreement governing a work transfer even though the transaction had not been anticipated during the ICC proceedings and implementation would override terms of existing collective bargaining agreements. *UP v. ATDA*, NYD § 4 Arb. (Fredenberger, 1984); *UP v. UTU*, NYD § 4 Arb. (Brown, 1985); *BLE v. UP/MP*, NYD § 4 Arb. (Seidenberg, 1985); and *UTU v. NW/SR*, NYD § 4 Arb. (Ables, 1985). In *UP v. ATDA*, *supra* at 12, Arbitrator Fredenberger relied on the *DRGW* case and concluded that "... the ICC ... determined that the Railway Labor Act and existing collective bargaining agreements must give way to the extent that the transaction authorized by the Commission may be effectuated." When it approved the CSX control application, the ICC necessarily authorized the transfer of work from one carrier to another as the inevitable consequence of implementing a transaction. If the Organization prevails, it would achieve its objective of thwarting all transactions. Such an outcome effectively cancels the ICC's approval in the control case. The Carriers would be precluded from ever obtaining the savings and benefits of operating a single rail system. In the *DRGW* case at page 5, the ICC emphasized that its "... approval exempts a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption ... " from the Railway Labor Act. See also, *Brotherhood of Locomotive Engineers v. Chicago & North Western Railway Co.*, 314 F.2d 424 (8th Circ. 1963), cert. den., 375 U.S. 819 (1963). Continuing on the next page of its decision, the ICC squarely rejected the Organization's inference that its ruling conflicted with Section 2 of the New York Dock Conditions when it declared:

> "The terms of those conditions, however, must read in conjunction with our decision authorizing

> the involved transaction and the underlying statutory scheme. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction."

The Organization employs wishful thinking when it asserts that the ICC subsequently modified its view of its own authority when the *DRGW* case reached the Supreme Court. The footnote which the Organization cites from the ICC's brief is attached to an unequivocal sentence reading: "The scope of the exemption is defined by the terms of the approved transaction." The ICC's brief provides little solace for the Organization. In its Reply Brief filed with the Court, the ICC vigorously asserted that provisions of the Railway Labor Act and collective bargaining contracts are automatically superseded to the extent necessary to carry out approved transactions. The ICC knew, as stated in its brief, that if the Carriers first had to endure the protracted negotiating procedures, with the right of economic self-help, contained in the Railway Labor Act, the transaction would be indefinitely delayed and most probably nullified. Thus, mandatory arbitration under Section 4 of the New York Dock Conditions insures that the parties will arrive, through either negotiation or arbitration, at an implementing agreement. Section 4 obviates the "... risk of non-consummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement these transactions ... " *Maine Central Railroad Co., Georgia Pacific Corporation, Canadian Pacific Ltd. and Springfield Terminal Railway Co. - Exemption From 49 U.S.C. 11342 and 11343*, I.C.C. Fin. Docket No. 30532 (August 22, 1985); appeal pending No. 85-1636 (D.C. Cir.).



All Carmen, who transfer from Waycross to Raceland, must be placed under the C&O Agreement to necessarily effectuate the coordination. And, the transaction cannot be consummated unless the Waycross freight car heavy repair work is shifted to the coordinated facility.

On December 30, 1980, the Organization entered into an implementing agreement providing for the transfer of SCL Carmen's work to the C&O. To reiterate, the Organization acknowledged that, as a consequence of accomplishing the transaction, Carmen may be removed from the SCL Agreement and placed under the C&O Agreement. In addition, the Carriers stress that they successfully negotiated implementing agreements covering this particular transaction with four of the six other labor unions representing affected Waycross employees. As to the two unions which have not signed implementing agreements, the unresolved issues are unrelated to the Carriers' right to transfer workers from Waycross to Raceland.

The Organization has the misplaced notion that the Carriers desire, through this Section 4 arbitration, to vitiate the Orange Book and schedule Agreements. After implementation, the SCL working Agreement and the Orange Book will remain viable and unaltered. Orange Book protected employees moving to Raceland will retain the full spectrum of benefits in the Orange Book.

In summary, this Committee has the jurisdiction to prepare an implementing agreement so that the Carriers may consolidate the work at Raceland. The exemption from the Railway Labor Act is coextensive with the ICC's approval in the control case.

With regard to the sufficiency of the Carriers' August 29, 1986 notice, the document disclosed exactly what changes were forthcoming and included an estimate of the number of employees, in each class, affected by the planned changes. The notice described the relevant Waycross work, noted the Waycross positions to be abolished

and the Raceland positions to be established, and informed the Organization of CSX's intent to close the Waycross facility. The plain, obvious fact was that the 22 employees (directly affected by the coordination) would be protected under the New York Dock Conditions. The notice contained sufficient details to permit the Organization to discuss the impending changes. None of the other labor organizations (which represent members affected by the transaction) challenged the adequacy of the notice. The Neutral Member of this Committee has previously ruled that the adequacy of Section 4 notices must be adjudged on a case by case basis. *C&O/L&N v. BRS*, NYD § 4 Arb. (LaRocco, 1985). The notice in this case is even more specific and informative than the notice tendered in the above case and thus, it conformed to Section 4 of the New York Dock Conditions.

### C. The Carriers' Position on the Contents of an Implementing Agreement

During negotiations, the Carriers offered the BRC more generous terms than the minimum level of benefits contained in the New York Dock Conditions. However, the Carriers' offer was conditioned on expeditiously consummating an agreement without resorting to arbitration. When negotiations reached impasse, the Carriers withdrew their offer and substituted the proposed October 15, 1986 implementing agreement. This Committee should disregard the Carriers' withdrawn proposals to encourage the Organization to reach negotiated settlements on future transactions. In addition, a Section 4 Arbitrator lacks the authority to write an implementing agreement which grants workers benefits greater than those specified in the New York Dock Conditions.

Immediately upon notification of the impending transaction, the Organization took the novel position that Orange Book protected workers could not be transferred to Raceland. Contrary to the Organization's bold assertion,



there is no language in the Orange Book prohibiting the Carriers from moving Orange Book protected employees to points beyond the boundaries of the former SCL property. Since 1966, none of the labor organizations which are parties to the Orange Book, including the BRC, have even suggested that the Carriers may only transfer Orange Book covered employees to other SCL locations. If any labor organization had taken such an untenable position, the issue would certainly have been adjudicated long ago. Orange Book Section 3(a) permitted the Carriers to transfer Orange Book employees throughout the former SCL system and concomitantly required the Organization to negotiate implementing agreements governing the force rearrangements. The Organization cannot, twenty years later, convert an affirmative right flowing to the SCL into a restriction on the Carriers' right to move Orange Book employees beyond the former SCL property.

By already signing implementing agreements, other labor organizations involved in this coordination recognize the Carriers' right to require Orange Book protected employees to transfer to Raceland with their work. Moreover, the current BRC General Chairman was not in office when the Orange Book was signed. His predecessor was privy to Orange Book negotiations. The former General Chairman implicitly acknowledged that Orange Book protected employees could be transferred to other than SCL points because he entered into implementing agreements providing for such transfers. The Seaboard System Railroad's former Executive President, who is also familiar with both negotiating and applying Orange Book provisions, confirmed that the parties never intended to grant Orange Book protected workers insulation from transfers to locations other than those on the former SCL property. The retired Executive Vice President further attested in Paragraph 12 of his December 8, 1986 affidavit:

> "12. From my familiarity with the negotiations leading to the agreement known as the Orange

> Book, there was a 'give and take' whereby certain working life income guarantees were granted by the merging railroads in exchange for the right of the merged carrier, SCL, to transfer work, consolidate facilities, and thereby transfer employees pursuant to implementing agreements to be negotiated thereunder."

The Orange Book was negotiated in an atmosphere replete with railroad mergers. The Orange Book drafters could easily foresee that there would be additional mergers necessitating SCL employees to relocate on the expanded property of a successor employer.

The parties have never accorded Orange Book covered employees the absolute right to remain on the SCL property. Pursuant to a December 30, 1980 implementing agreement, SCL Carmen, including Orange Book employees, transferred to the C&O. Six SCL Carmen, three of whom came under the Orange Book, shifted to the C&O and continued to enjoy Orange Book protection. In 1967, shortly after the Orange Book was signed, the Organization was a party to an implementing agreement providing for the transfer of SCL Carmen to the Richmond, Fredericksburg and Potomac Railroad. In 1973, the BRC along with other shop craft unions entered into an implementing agreement covering the coordination of SCL and Louisville & Nashville Railroad (L&N) shop facilities in Alabama. Other labor unions have also entered into implementing agreements requiring Orange Book protected workers to transfer off the SCL. Some Orange Book employees opted for a separation allowance per Orange Book Appendix G.

The Organization is again attempting to forever block the transaction by arguing that the transfer would place workers in a worse position, as specified in Orange Book Section 2(b), due to weather differences between Raceland ("harsh") and Waycross ("mild"). The contention is ludicrous. Greater weather variations can be expected vis-a-vis Miami, Florida and Richmond, Virginia yet, even the



Organization concedes that the Orange Book allows transfers between these two SCL points.

The Organization's proposed implementing agreement terms go far afield of the New York Dock Conditions and would render the transaction so expensive as to effectively prevent implementation. The Organization proposes that all Carmen may decline Raceland positions and, upon their voluntary furlough, still collect Orange Book benefits or New York Dock dismissal allowances. The Carrier would not only be burdened with paying expensive protection benefits but also would have to pay Raceland employees to perform Waycross work. The BRC General Chairman on the C&O seeks to automatically certify an unspecified number of Raceland employees even though dovetailing seniority does not constitute a *per se* adverse effect on junior Raceland Carmen. Whether or not any Raceland workers are eligible for New York Dock payments is best left to a Section 11 proceeding. In the control case, the ICC rejected labor's requests to prohibit residence changes and to enact a conclusive presumption as to adverse effect. 363 I.C.C. 589-590. Another Organization proposal might be inequitably construed to allow senior, furloughed Raceland Carmen to immediately displace junior workers who just followed their work from Raceland. Finally, the SCL General Chairman inappropriately urges utilization of furloughed Waycross Carmen ahead of Raceland employees. Not surprisingly, both the Carriers and the Organization's C&O General Chairman oppose this proposal.

On the other hand, the Carriers' proposed implementing agreement follows the New York Dock Conditions. Forced assignments at Raceland should be made in seniority order consistent with an employee's duty to exercise seniority over his work to the fullest extent. Once the transaction is implemented, there is no reason for the transferred workers to retain seniority at Waycross. The

Carriers request the Committee to adopt their October 15, 1986 proposed implementing agreement.

### D. The Organization's Position on the Contents of an Implementing Agreement

The Orange Book clearly and unambiguously affords covered workers lifetime job protection on the SCL. The only exceptions are found in Orange Book Section 2(e). Section 3(a) permits work transfers on the ACL-SAL consolidated system but no further. Transferring Orange Book employees beyond the SCL property places them in a worse position with respect to their working conditions. See Orange Book Section 2(b). The intent and language of the Orange Book demonstrates that covered employees received guaranteed jobs on the former SCL property throughout their worklife. The Orange Book protection is shielded by Section 3 of the New York Dock Conditions and Orange Book protected employees have the right to elect Orange Book benefits as soon as they are affected by a New York Dock transaction. *SSR v. BRAC*, NYD § 4 Arb. (Zumas, 1983). Thus, they are entitled to opt for protective benefits and decline to transfer to Raceland.

The Carriers are unable to point to any Orange Book provision giving the Carriers the unilateral right to move Orange Book employees to the C&O property. On the contrary, Section 3(a) sets the limits of the Carriers' right. Moreover, the terminology regarding seniority in Section 2(e) refers to ". . . existing rules or agreements." Those rules, which are found in the agreements in effect at the time of the merger, provide for point seniority. For the same reasons, the classification of work rule in the January 1, 1968 schedule Agreement preserves the Waycross freight car heavy repair work to the Carmen's craft on the SCL. The Carriers' proposed implementing agreement would abrogate the Orange Book and the then existing working agreement.



At one time (in 1980), the Organization voluntarily entered into an implementing agreement allowing the Carriers to transfer SCL employees, including some Orange Book protected workers, from the SCL property at Richmond to a C&O facility in the same city. The Organization's voluntarism is not precedent for the wholesale removal of all Orange Book protected employees from the SCL. In contrast to the instant transaction, the Orange Book employees were not required to change their residence. The Carriers cannot compel the Organization to execute a similar implementing agreement under the guise of the New York Dock Conditions. The Organization's voluntary action was non-precedential. Although other labor organizations signed implementing agreements to govern this transaction, none (or at most one) of their members, who are involved in this transaction, enjoy Orange Book protection.

The Raceland weather is much more severe than at Waycross. Many of the Waycross Carmen work outdoors. Moving to a harsher working environment constitutes a change in working conditions which is prohibited by Section 2 of the New York Dock Conditions.

Besides provisions keeping Orange Book protected employees on the former SCL property and guaranteeing these workers an election of benefits at the time this transaction is effectuated, the implementing agreement should contain terms close to the implementing agreement originally proposed by the Carriers. The Carriers' October 15, 1986 proposal is grossly inferior to their prior offer. The Carriers are improperly penalizing the Organization for sincerely raising other issues, such as Orange Book interpretation, which directly impacted on the negotiations over an implementing agreement.

The BRC advocates the following changes to the Carriers' October 15, 1986 proposal. First, forced assignments to unfilled Raceland positions should be accomplished in

reverse seniority order. Since there will be fewer positions established at Raceland, it is more logical to start with junior affected employees allowing the senior workers, as opposed to junior workers, to remain in Waycross and draw protective benefits. Second, since the work being transferred to Waycross would have accrued to furloughed Waycross Carmen upon the retirement, resignation or death of active Waycross employees, the furloughed Waycross Carmen should have superior rights over Raceland employees to the transferred work. However, the BRC General Chairman on the C&O takes exception to this particular proposal. Third, workers who transfer should retain dual seniority at Raceland and Waycross. If a position (other than one of temporary duration) becomes vacant at Waycross, these workers will have a one time opportunity to return to Waycross and depending on their election, they will forfeit either their Raceland or Waycross seniority. Fourth, the Organization proposes the following language for inclusion in the implementing agreement:

> "When the transfers from Waycross to Raceland take place, a like number of the C&O employees at Raceland will be provided with *New York Dock* protective conditions starting with the oldest Raceland employee that falls below the youngest employee transferring in from Waycross; i.e., if 86 Waycross carmen are dovetailed into the Raceland seniority roster, then 86 Raceland carmen–starting with the oldest Raceland carmen in seniority–who falls below the youngest carmen in seniority from Waycross will be protected by the *New York Dock* protective conditions."

The C&O General Chairman asserted that Raceland has already absorbed several consolidations involving incoming workers over the last several years. While dovetailing is the fairest method of combining seniority rosters, each added coordination has detrimentally affected the relative seniority standing of Raceland Carmen. The constant influx of more senior workers cancels the benefits



derived from the accumulation of seniority. Subsequent to the transfer of work from Waycross, it becomes more likely that some presently employed Raceland Carmen will be furloughed. Protecting Raceland workers would give them more job security and compensate them for the loss of relative seniority. If the Carriers have correctly estimated that there will be sufficient work to occupy 99 additional Carmen, it should not object to protecting an equivalent number of Raceland Carmen because presumably the latter will continue in active employment.

## VI. DISCUSSION

### A. Jurisdiction

**1. The Notice.** The threshold issue before this Committee is whether the Carriers' August 29, 1986 notice conforms to the minimum requirements of Section 4 of the New York Dock Conditions. The pertinent portion of Section 4 provides: "Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes."

The Neutral Member of this Committee commented on the purpose and meaning of the above language in another Section 4 case, as follows:

> "The purpose of the advance notice is twofold: the notice triggers the Section 4 procedures which contain tight time deadlines for obtaining an implementing agreement; and, it informs the Organization (as well as all interested employees) of the impending, authorized New York Dock transaction so that the Organization and the Carriers may bargain, in good faith, over the terms of an implementing agreement. 360 I.C.C. 71. The notice must contain a full and adequate statement of the intended transaction and include an estimate of the number of affected workers. Since the ICC, in Article 1, Section 4(a) did not enumerate the essential elements of a New York Dock

> notice (aside from the adjectives "full and adequate" and the mandatory estimate), whether a particular notice conforms to Section 4(a) must be decided on a case by case basis." *C&O/L&N v. BRS*, NYD § 4 Arb. (LaRocco, 1985).

Thus, the propriety of a Section 4 notice must be evaluated on a case by case basis taking into account the surrounding circumstances and peculiarities of each New York Dock transaction.

In this case, the notice satisfied Section 4. Since the Carriers intend to close the Waycross facility, all freight car heavy repair work will be transferred to Raceland and thus, the Carriers did not have to quantitatively or qualitatively describe the freight car repair work. Also, the Carriers, in good faith, estimated the number of employees in each class who would be involved in the force rearrangement. The notice laid the groundwork for meaningful negotiations. The Organization can hardly contend that it was ill-prepared for bargaining. The notice adequately apprised the Organization of the nature or the impending transaction because it easily ascertained that, from its perspective, the transaction would vitiate employee rights in the Orange Book and the SCL working Agreement.

**2. Subject Matter Jurisdiction.** In Section 1(a) of the New York Dock Conditions, the ICC broadly defines a transaction as ". . . any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." 360 I.C.C. 84. The parties concur that the transfer of freight car heavy repair work from Waycross to Raceland constitutes a New York Dock transaction. It is also undisputed that the intended consolidation was not expressly and specifically presented to the Commission during administrative proceedings culminating in approval of the control application.

Where a transaction may cause the dismissal of displacement of workers, an implementing agreement:



> ". . . shall provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case and *any assignment of employees made necessary by the transaction* shall be made on the basis of an agreement or decision under this section 4." [Emphasis added.] 360 I.C.C. 85.

While the ICC clearly authorized the Carriers to undertake transactions, it also plainly provided for the plenary preservation of all existing collective bargaining rights, collective bargaining agreements and employee protection agreements. (See Sections 2 and 3 of the New York Dock Conditions.) When the Carriers' authorized transaction embraces components which could arguably conflict with the terms of one or more existing agreements, the issue becomes to what extent, if any, a New York Dock implementing agreement may properly preempt the existing agreements and the Railway Labor Act. The issue is an ongoing controversy in rail labor relations and is currently before the United States Supreme Court. Thus, any principles we espouse on this matter should be reevaluated based on the Supreme Court's decision in the *DRGW* case.

To resolve the issue in this case, we start by attempting to balance the competing policies of the Railway Labor Act and the ICC's New York Dock Conditions on the one side and the Interstate Commerce Act on the other side. The New York Dock Conditions were imposed on railroads for the exclusive benefit of any employee affected by a transaction. However, the Conditions were imposed as part of the ICC's overall regulatory scheme which is designed to encourage merged rail carriers to augment their ability to compete in the transportation marketplace by consolidating operations. Transactions leading to more efficient operations frequently contradict the Railway Labor Act's policy of avoiding disruptions to interstate commerce by promoting collective bargaining. Consolidations upset stable collective bargaining relationships. Thus, there is not just

tension between the Railway Labor Act and the Interstate Commerce Act but a classic clash of two important Federal statutes. Compare: *Texas and New Orleans Railroad Co. v. Brotherhood of Railroad Trainmen*, *supra* at 158-160, with *Brotherhood of Locomotive Engineers v. Chicago and North Western Railway Co.*, *supra*. The conflict has been carried forward into the New York Dock Conditions.

As a quasi-judicial extension of the ICC, this Committee must strictly follow the ICC's interpretation of its own authority. In the *DRGW* case, the ICC decided that 49 U.S.C. 11341(a), the source of the exemption, granted the Commission expansive and self-executing authority to immunize an approved transaction from the Railway Labor Act and existing collective bargaining agreements to the extent the statute and terms of the agreements bar implementation of the transaction. According to the ICC, Section 11341(a) insulates a transaction from all legal obstacles preventing or impeding effectuation. Subsequent to the ICC's ruling in the *DRGW* case, arbitrators who promulgated New York Dock implementing agreements pursuant to Section 4, have universally decided that implementation of a transaction prevails over conflicting terms in existing collective bargaining agreements. *ATDA v. UP*, NYD § 4 Arb. (Fredenberger, 1984); *UTU v. MP/UP*, NYD § 4 Arb. (Ables, 1985); and *BLE v. UP/MP*, NYD § 4 Arb. (Seidenberg, 1985). In an effort to distinguish those decisions, the Organization argues herein that the ICC recently tempered its perception of the outer limits of the Section 11341(a) exemption. Pointing to a footnote at page 25 of the ICC's Brief to the Supreme Court, the Organization submits that the ICC now asserts that the exemption applies ". . . only to terms comprehended by the Commission's approval order." The Organization concludes therefore, that the exemption is inapplicable to the Waycross-Raceland coordination. We disagree. The ICC's Opening and Reply Briefs do not include any definitive language demonstrating a modification of the ICC's



broad determination that its orders supersede the Railway Labor Act. Indeed, the footnote relied on by the Organization is appended to a statement asserting that the exemption mirrors the scope of the approved transaction. Elsewhere in its briefs, the ICC reiterates that the exemption goes beyond the transactions specifically mentioned in the approval proceeding so that railroads do not have to constantly return to the ICC to receive approval for each and every change made pursuant to the ICC's original order. At page 26, the ICC emphasized that the exemption arises automatically to cover "anything authorized or required" by an approval order. The last ICC pronouncement (more recent than the footnote cited by the Organization) is found at page 11 of its Reply Brief where the ICC declared:

> "The unions are also mistaken in contending that the ICA's own labor protective provisions, 49 U.S.C. (Supp. II) 11347, prohibit the Commission from adjusting collective bargaining rights. As the Commission explained (Pet. App. 59a-60a), Section 11347 and the Commission's labor protective provisions preserve existing collective bargaining rights only to the extent that they do not conflict with implementation of an approved transaction."

Although not expressed within the control application, the Raceland coordination is an approved transaction exempt from the Railway Labor Act.

However, the exemption is only triggered when necessary. The ICC has never indicated that an approved transaction can be utilized as a pretext for extinguishing or amending existing collective bargaining agreements. To the extent that terms of collective bargaining agreements and collective bargaining rights do not thwart or substantially impede the approved transaction, those agreements and rights are preserved. Therefore, there is some harmony between Section 11341(a) of the Interstate Commerce Act and Section 6 of the Railway Labor Act. 49 U.S.C. 11341(a); 45 U.S.C. 156. If feasible, the trans-

action should reasonably accommodate existing collective bargaining agreements and collective bargainning rights.

Next, the Organization urges us to draw a delicate distinction between Section 2 and Section 3 of the New York Dock Conditions. Prior merger protection agreements might be more inviolable than existing collective bargaining agreements because the prior merger agreements, like the Orange Book, were formulated under the auspices of Section 5(2)(f) (now Section 11347) of the Interstate Commerce Act. If so, the Organization correctly argues that the ICC must expressly relieve the Carriers from Orange Book provisions when it engages in a New York Dock transaction pursuant to an approval order issued subsequent to the order approving the ACL-SAL merger. Given the mandate in Section 11347, there is some doubt that Section 11341(a) exempts New York Dock transactions from conflicting terms in prior merger protective agreements. To our knowledge, the ICC has not addressed this dilemma. In the *DRGW* case, the ICC did not patently rule that the exemption abrogates prior employee protective agreements such as the Orange Book. We cannot speculate on exactly how the ICC would handle prior merger protection agreements. However, as we discussed above, the ICC has emphasized that a transaction hurdles all legal obstacles preventing implementation. Moreover, most rights and benefits preserved to employees under Section 3 of the New York Dock Conditions will be safeguarded through prudent applications of the reasonable accommodation standard.

Therefore, this Committee has jurisdiction to formulate an implementing agreement governing the transfer of work and employees from Waycross to Raceland.

### B. The Contents of an Implementing Agreement

1. **The Orange Book.** Section 2(b) of the Orange Book provides that a covered employee will not be deprived of employment or placed in a worse position with regard



to his working conditions at any time during such employment with the SCL. In exchange for lifetime protection, the Carriers acquired the right to transfer work and workers throughout the merged (SAL-ACL) system. See Orange Book Section 3(a). To that end, Section 3(a) calls for the execution of mandatory implementing agreements. Without such a clause, the point seniority terms of the working agreement would have restricted the Carriers from moving employees. Since it was necessary for the SCL to obtain a provision allowing it to transfer Orange Book protected employees throughout the merged system, it logically follows that a similar term is essential to permit the Carriers to transfer Orange Book covered workers beyond the SCL property. Instead, the Carriers desire to translate a limited, affirmative right into the unfettered discretion to transfer Orange Book workers throughout any enlarged rail system. An affirmative right carries an inherent implication that the right is restricted to the express terms conferring the affirmative right. The affirmative right is capped. Under the Carriers' interpretation, the Section 3(a) language would be unnecessary since they ostensibly have the right to transfer Orange Book employees throughout the SCL, L&N, B&O and the C&O. The parties do not enter into solemnly negotiated agreements only to have the terms of their agreements rendered meaningless or superfluous. The ACL and SAL could have foreseen that they might later become the part of an even larger rail enterprise. Thus, drafters of the Orange Brook could have easily written terms providing for unrestricted transfers across any enlarged rail system.

Our decision that the Carriers may not transfer Orange Book protected employees beyond the former SCL property is premised on the clear and express language of Section 3(a). While a past practice may not vary or alter the clear and unambiguous Orange Book language, the Carriers' reference to prior implementing agreements was insufficient to raise a consistent and genuine past prac-

tice even if Section 3(a) was susceptible to differing interpretations. The prior implementing agreements involved a modicum of Orange Book covered workers and under some of the agreements, the Orange Book employees could receive separation pay, an option they probably chose. The December 30, 1980 implementing agreement resulted in the transfer of Orange Book covered employees form the SCL to the C&O but only within the same city. In any event, the Organization voluntarily entered into the implementing agreement. Although other labor organizations have signed implementing agreements with the Carriers governing this transaction, at most there was only one Orange Book employee involved. Thus, these implementing agreements provide us with little guidance in interpreting the Orange Book.

Even though Orange Book Section 3(a) provides that the work of Orange Book protected employees may be transferred throughout the SCL property (but no further), the provision must be subordinated to the Carriers' right to engage in the authorized New York Dock transaction. Otherwise, the Carriers would be effectively thwarted from transferring all the Waycross freight car heavy repair work to Raceland. Unlike the work, the Orange Book limitation on transferring covered employees throughout the SCL system can be reasonably accommodated with the transaction. Permitting Orange Book covered workers to be transferred only throughout the SCL (absent a voluntary agreement with the Organization) will only slightly impair the transaction while preserving the essence of the Orange Book pursuant to Section 3 of the New York Dock Conditions. Even under the Carriers' proposed implementing agreement, some of the Orange Book employees would have exercised their seniority to remaining positions at Waycross in lieu of transferring to Raceland. In summary, this Committee emphasizes that whether or not Section 3(a) can be reasonably accommodated with a New York Dock transaction must be analyzed on a case by case basis.



Enforcing the limit on transferring Orange Book protected employees might, under different facts, operate to completely bar the transaction. Then, the ICC's authorized transaction would be paramount to Orange Book Section 3(a). In this case, the Carriers may not compel Orange Book protected workers to accept Raceland positions.

This Committee realizes that its decision will create an anomaly. The more senior Orange Book workers will be able to obtain other positions at Waycross. The junior Orange Book protected workers, who will presumably decline Raceland positions will collect Orange Book benefits. However, the Carriers have other alternatives under the Orange Book.

Despite the terminology in Orange Book Section 3(a), the New York Dock implementing agreement covering this transaction shall provide, without restriction, for the transfer of all freight car heavy repair work from Waycross to Raceland. As soon as the Carriers commence the transaction, Orange Book protected employees who are affected by the transaction must elect either New York Dock benefits or Orange Book protection. *BRAC v. SSR*, NYD § 4 Arb. (Zumas, 1983).

2. **Other Issues.** For the reasons discussed earlier in our opinion, the work and employees transferred from Waycross shall be placed under the C&O schedule Agreement. Maintaining the work or employees under the SCL working agreement would for all practical purposes, block the transaction. A reasonable accommodation is impossible since the terms of the working agreement conflict with the implementation of the transaction.

Regardless of whether Raceland or Waycross has the more comfortable climate, the Carriers would be barred from effectuating any New York Dock transaction if workers could decline a transfer merely by asserting that the weather at their current point was more amenable than the meteorological conditions at the coordinated location.

Most importantly, the Organization is unable to cite any term in any existing agreement vesting Carmen with the right to perform work in a particular climate.

Most of the Organization's other proposals concern the inclusion of benefits more generous than the minimum level of benefits prescribed by the New York Dock Conditions. When fashioning an implementing agreement, a Section 4 arbitrator must adhere to the New York Dock Conditions. *BRC v. C&O/SSR (L&N)*, NYD § 4 Arb. (Marx, 1984). The parties are, of course, free to incorporate benefits above and beyond those in the New York Dock Conditions. In addition, the Carriers cannot be bound to their earlier offers containing benefits greater than those in the New York Dock Conditions. No party would offer a compromise if the party could later be held to the offer. Conditioning an agreement on acceptance of a package deal is a common tactic in labor negotiations. Thus, the Carriers could properly withdraw their October 10, 1986 proposed implementing agreement without prejudice to their position before this Committee.

The BRC's General Chairman on the C&O petitions us to automatically certify (for New York Dock protection) an equivalent number of junior Raceland Carmen corresponding to the number of workers transferring into Raceland. Section 1 of the Carriers' proposal provides blanket New York Dock coverage for all workers (at any location) who are affected by the instant transaction. The Carriers' proposal is simple and straightforward. In the control case, the ICC rejected labor's position that any adverse employment effect should be conclusively presumed to be merge related. 363 I.C.C. 521, 589. Whether any Raceland worker is affected by this transaction and eligible for New York Dock protection must be referred to a Section 11 arbitration committee. Waycross employees moving to Raceland shall be dovetailed into the appropriate roster under the C&O Agreement.



Section 4 of the New York Dock Conditions charges us with selecting forces on a basis appropriate for this transaction. The BRC proposes that Waycross Carmen, who transfer to Raceland, retain their Waycross seniority and have a one time right of first refusal to a permanent Waycross vacancy. The New York Dock Conditions contemplate an orderly and final adjustment of forces during implementation of the transaction. Maintenance of dual seniority defeats that objective. Finally, the parties should incorporate the Carriers' proposed preference tires for filling Raceland positions. [See Section 3(f) of the Carriers' October 15, 1986 proposal.]

Due to our finding that, under the unique facts of this case, the New York Dock Conditions prevent the Carrier from transferring Orange Book protected workers to Raceland, the Carrier must be given an opportunity to reevaluate the number of positions to be either abolished at Waycross or established at Raceland. If the Carrier adjusts the number of positions at either point, the amendment should be incorporated into the implementing agreement.

In summary, this Committee adopts the Carriers' proposed implementing agreement dated October 15, 1986 with the modifications specified in our Opinion. The parties agree that the effective date of this Award shall be March 23, 1987.

## AWARD AND ORDER

This Committee renders the following Award and Order:

1. The Committee has jurisdiction over the subject matter of this dispute;

2. The parties shall adopt the Carriers' October 15, 1986 proposal as the Implementing Agreement governing the Waycross-Raceland Coordination with the following modifications:

   a. Adopt any adjustment in the number of positions to be either abolished at Waycross or established at Raceland; and,

   b. Adopt a provision relating to Orange Book protected workers which is consistent with this Opinion;

3. The Answer to the Organization's Issue No. 1 is "Yes";

4. The Answer to the Organization's Issue No. 2 is "No";

5. The Answer to the Organization's Issue No. 3 is "Yes";

6. The Answer to the Organization's Issue No. 4 is specified in (2) above;

7. The Answer to the Question at Issue presented by the BRC General Chairman on the C&O is "No."

Dated: March 23, 1987

/s/ R.P. Wojtowicz, Dissenting
R.P. Wojtowicz
Employees' Member

/s/ J.T. Williams
Concurring in Part
And Dissenting in Part
J.T. Williams
Carriers' Member

/s/ John B. LaRocco
John B. LaRocco
Neutral Member



## CARRIERS MEMBER'S CONCURRENCE AND DISSENT TO AWARD DATED MARCH 23, 1987, PURSUANT TO ARTICLE I, SECTION 4 OF THE NEW YORK DOCK CONDITIONS AND SECTION 4 OF THE NOVEMBER 3, 1966 MERGER PROTECTIVE AGREEMENT

I concur with the Committee's Award and Order in paragraphs 1, 2, 2(a), 3, 5, 7, and that portion of paragraph 6 that incorporates paragraphs 2 and 2(a). I dissent from the Committee's Award and Order in paragraphs 2(b), 4, and that portion of paragraph 6 that incorporates paragraph 2(b), for the reasons set forth below.

### I. The Committee's Interpretation of the Orange Book Is Completely Without Foundation in the Arbitral Record or the Agreement and Exceeds Its Jurisdiction.

The Orange Book Agreement is a merger protective agreement entered into by Seaboard Air Line Railroad Company and Atlantic Coast Line Railroad Company on November 3, 1966, in connection with the ICC-autorized merger which created the Seaboard Coast Line Railroad Company (SCL).* Pursuant to Section 4 of the Orange Book, this Committee was constituted in part to determine whether the Orange Book prohibited transfer of Orange Book-protected employees from a freight car heavy repair facility at Waycross, Georgia, formerly an SCL location, to Raceland, Kentucky, on The Chesapeake and Ohio Railway Company (C&O). The conclusion of this Committee that the Orange Book prohibits transfer of protected employees and their work off the SCL property is completely without foundation in the arbitral record or the Orange Book itself and exceeds the Committee's jurisdiction. There is absolutely no language in the Orange Book

---

* As a result of subsequent mergers and name changes, CSX Transportation, Inc., is the current successor of SCL.

that supports such a conclusion and the action of the Committee is tantamount ot ignoring its express provisions and to rewriting the Agreement.

The Committee places total reliance for its conclusion on section 3(a) of the Agreement, which provides, in relevant part:

> (a) In consideration of the foregoing employee benefits the Merged Company shall, subject to compliance with the provisions of Appendix F attached hereto, be entitled to transfer the work of the employees protected hereunder throughout the merged or consolidated system and the labor organizations will, subject to provisions contained in the Memorandum of Understanding attached hereto as Appendix G, enter into implementing agreements providing for the transfer and use of employees and allocation or rearrangement of forces made necessary by changes for which protection is herein provided and the employees, their organizations and the Carriers will cooperate to that end.

This language does not even purport to prohibit the transfer of work and protected employees off the former SCL system. The Committee's assertion that section 3(a) clearly and unambiguously prohibits such transfers is completely outside any reasonable reading of that section. Indeed, clear and unambiguous language to that effect could have easily been written, had such a limitation been intended, i.e.: " The Merged Company is prohibited from transferring work and protected employees off the property of the Merged Company as it exists on the date of merger." The Orange Book contains nothing even remotely resembling such language.

*Section 3(a) quite simply authorized the SCL to transfer work and employees throughout its merged or consolidated system as it then existed as a result of the authouized SAL-ACL merger.* The Orange Book does not include a prohibition on transfers off the SCL property. If any such



prohibitions exist, they must be found in the applicable working agreement, not in the Orange Book. Indeed, the Committee acknowledges at p. 35 of the Award that the source of any such restriction is the "point seniority terms of the working agreement." Thus, the affirmative transfer rights provided by the Orange Book overrode the working agreement by permitting transfers throughout the merged system.

Orange Book protected employees were not intended to have greater protections against transfers than non-protected employees; indeed, one purpose of the Orange Book was to eliminate any restriction against transfers in exchange for the protective benefits granted in that agreement.

The Committee is totally in error when it states at page 35 of the Opinion that the Carriers are attempting "to translate a limited, affirmative right [to transfer Orange Book employees throughout the SCL] into an unfettered discretion to transfer Orange Book workers throughout any enlarged rail system." The Carriers never urged that the Orange Book was the source of its right to transfer Orange Book employees from Waycross to Raceland. The Carriers never served a notice under the Orange Book to accomplish the transfer to Raceland. The source of the Carriers' right in this transaction is the ICC authorization and the *New York Dock* Conditions. The Carriers served a *New York Dock* notice under the ICC's *CSX-Control* authorization to accomplish not only the transfer of *work*, but equally as important, the transfer of Orange Book *employees* to Raceland. Where the carrier obtains the authorization to transfer its employees off former SCL property from an independent source, such as the instant ICC order and the accompanying *New York Dock* conditions, nothing in the Orange Book prohibits the exercise of that authority with respect to Orange Book-protected employees.

Contrary to the Committee's understanding, the Carriers never stated that Section 3(a) of the Orange Book provided the affirmative right to transfer employees to Raceland. The Carriers correctly asserted that Section 3(a) *did not prohibit* transfers off the SCL. It neither authorized nor prohibited such transfers because the Orange Book looked only to the SCL merger. Absent any such prohibition, the Committee exceeded its authority by fashioning one out of whole cloth.

Furthermore, the Committee's discussion of the Orange Book in Section B.2. completely ignores Section 2(e) of the Orange Book, which expressly provides that Orange Book protection may be terminated in case of an employee's "failure to obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements." This language is *not* limited to exercise of seniority rights on the SCL property. Rather, it requires the exercise of any seniority rights an Orange Book employee may have or may acquire under existing agreements at any point in time. Section 2(e) is full applicable to situations such as the present one where by virtue of an ICC-authorized *New York Dock* transaction, an Orange Book employee acquires seniority rights to a position available to him off the SCL property. In this case the Carriers, transaction results in Orange Book employees acquiring seniority rights to Raceland positions. The Committee's conclusion that an Orange Book employee can reject a position to which he has seniority rights and retain his Orange Book protection is flatly contrary to the express mandate of section 2(e) of the Orange Book. The Committee's Award effectively writes section 2(e) out of the Agreement.

The Committee's interpretation of the Orange Book is also contrary to all of the evidence submitted at the hearing. The Carmen submitted *absolutely no evidence* to support their claimed interpretation of the Orange Book.



Carriers, by contrast, submitted numerous implementing agreements with various crafts, including the Carmen, that explicitly provided that an Orange Book employee who declines a job off former SCL property *forfeits his Orange Book protection*. An Orange Book employee's only alternative to making a required relocation is to elect to resign in exchange for a lump sum separation allowance pursuant to Appendix G of the Orange Book.

These prior implementing agreements stand as unrefuted evidence of the parties' interpretation of the Orange Book. The first such agreement was entered into in 1967 and the Carmen were a party to it; more recently, such agreements were entered into less than two months prior to this arbitration hearing. The 1967 agreement is particularly compelling since it was entered into within one year of the Orange Book itself. These agreements establish that the parties have in fact applied the Orange Book precisely in accordance with the Carriers' position in this case: if an implementing agreement makes a position off the former SCL available to an Orange Book employee and that employee cannot otherwise hold an SCL position, the employee cannot decline the available position and retain his Orange Book protection.

The arbitral record contains no contrary evidence -- the Carmen could produce no implementing agreements which provided that Orange Book employees could decline positions off former SCL property and retain their Orange Book protection; nor could they cite even one instance where the Carriers attempted to transfer Orange Book employees off the SCL but were unable to do so because of any language in the Orange Book. Furthermore, the Carriers produced actual instances of approximately eighty Orange Book protected employees who were transferred off SCL property. The Carmen could not produce even one instance where an Orange Book-protected employee refused to transfer off former SCL property and retained

his protection. The implementing agreements unequivocally support Carriers' position that the Orange Book does not prohibit transfers off SCL property.

Carriers exhibited as part of their evidence in this case a prior New York Dock Section 4 arbitration award on this property in which the Neutral Member of this Committee (LaRocco) held:

> "Article I, Section 4 provides for the selection of forces which is most appropriate in each case. *The most reliable evidence for determining the appropriate method of allocating forces in this case is to look at how the parties resolved a similar issue in the past.*" (emphasis added)

In the case at hand, the Carriers submitted in evidence a dozen implementing agreements with the Carmen and other unions party to the Orange Book, all of which contemplated the transfer of Orange Book employees off the SCL to other railroads. Despite "looking" at these instances of how the parties interpreted the Orange Book in the past, this same Neutral Member (LaRocco) unaccountably chose to discount the implementing agreements as providing "us with little guidance in interpreting the Orange Book." Opinion at p. 36.

Of the dozen implementing agreements submitted in evidence by the Carriers, the Committee chose to discuss one – a 1980 agreement – which it noted involved transfers within the same city, but for reasons unexplained, ignored the several other agreements involving transfers between different cities. Although the Carriers' evidence clearly showed the actual names of more than eighty Orange Book employees who did transfer off the SCL to other railroads, the Committee described that number as a "modicum" and speculated without foundation that the Orange Book employees "probably" opted for a separation allowance in lieu of transferring. The Committee ignored the fact that separation allowances would have been available in the present transaction to those Orange



Book employees who prefer that option to transferring to Raceland.

The Committee at page 36 lays the erroneous foundation that the language of Section 3(a) is "clear and express" in prohibiting transfers of Orange Book employees off the SCL in order to discount the compelling evidence of past practice presented by the Carriers and to divert attention from the glaring lack of evidence presented by the Carmen. The Committee then characterizes the Carriers' evidence as "insufficient to raise a consistent and genuine past practice." An unbiased review of the record reveals a dozen implementing agreements which contemplated transfers of Orange Book employees off the SCL. The Carmen produced no implementing agreements at all. Thus, 100% of the evidence demonstrated a consistent and genuine past practice of twenty years' duration supporting the Carriers' position. There is absolutely no support in any of the agreements for existence of an Orange Book prohibition against transfers off SCL property.

The Committee also implicitly suggests that the organizations may have voluntarily waived Orange Book rights of their members. This suggestion is ludicrous. There is only one explanation why time after time over a twenty year period organizations acknowledged that Orange Book employees must accept positions off SCL property: they had no choice, because the Orange Book itself did not protect the employees against the required transfers.

The foregoing agreements and evidence flatly controvert the Committee's conclusion that an Orange Book employee may refuse to transfer off SCL property and still retain his Orange Book protection. They compel the finding that an Orange Book employee has no such right.

Finally, Carriers submitted an affidavit from C. E. Mervine, the retired Senior Vice President - Labor Relations who participated in the Orange Book negotiations, which was in complete harmony with the history of the

parties' actions as evidenced by the implementing agreements. For example, the affidavit states:

> 10. . . . I have particularly noted Mr. McAlpine's claims that the Orange Book insulates an employee protected under its terms from being required to transfer to locations other than those on the former Seaboard Coast Line property. Mr. McAlpine is in error, because from my knowledge of the Orange Book and its terms, and being very familiar with its intent, I can state that it grants no such right to employees protected thereunder; nor did the parties signatory to the Orange Book ever intend or contemplate that Orange Book protected employees would ever have or secure such rights.

The Carmen produced no contrary evidence from any union negotiators. The Committee simply ignored the affidavit, which makes clear that the Orange Book does not permit protected employees to refuse transfers off former SCL property and retain protection.

The Committee, acting in its capacity under Section 4 of the Orange Book Agreement, has exceeded its jurisdiction by reaching an interpretation of the Orange Book that disregards the express language of that Agreement as well as the unrebutted evidence in the record. The interpretation is wholly baseless and fails to draw its essence from the Orange Book or the record before the Committee; accordingly, I dissent.

## II. The Committee Errs in Refusing to Supersede its Perceived Limitation on the Transfer of Orange Book-Protected Employees.

Separate from and independent of its erroneous conclusion discussed above, the Committee errs in refusing to carry out its obligation under the Interstate Commerce Act and Article I, Section 4 of the *New York Dock* Conditions to supersede those provisions of the Orange Book that the Committee finds limit Carriers' authority to



transfer Orange Book-protected employees from Waycross to Raceland.

In refusing to supersede this perceived contractual limitation, the Committee has erroneously applied the very I.C.C. decisions that it recognizes establish the proper standard under the Interstate Commerce Act and that it purports to follow. Those decisions establish that contractual and other legal limitations that "conflict with" a carrier's proposed implementation of an I.C.C.-approved "transaction" are, as a matter of law, superseded as a result of section 11341 (a) of the Interstate Commerce Act. Because a limitation on the transfer of Orange Book-protected employees clearly "conflicts with" the authorized transaction, as the Committee recognizes in its Opinion, the Committee should have approved the Carriers' proposed implementing agreement that would have required such employees to follow their available work from Waycross to Raceland.

At page 33 of its Opinion, the Committee correctly concludes that "the Raceland coordination is an approved transaction." Indeed, as the Committee accurately observed, the Carmen acknowledged the the "transfer of freight car heavy repair work from Waycross to Raceland constitutes a New York Dock transaction." Opinion at 29-30. Thus, the proposed transfer of work is an "action taken pursuant to authorizations of [the Interstate Commerce] Commission" in *CSX-Control. New York Dock* Conditions, Article I, Section 1 (a).

The Committee also correctly recognizes at page 33 of its Opinion that, as an I.C.C.-approved transaction, the proposed transfer is "exempt from the Railway Labor Act" as a result of the provisions of section 11341 (a) of the I.C.A., which provides in relevant part that:

> "A carrier . . . participating in that approved or exempted transaction is exempt from the anti-trust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction . . . ."

Moreover, the Committee properly recognizes that, under Article I, Section 4 of the *New York Dock* Conditions, it serves as "a quasi-judicial extension of the ICC" and, as such, "must strictly follow the ICC's interpretation of its own authority." Opinion at 31. The Committee acknowledges that the I.C.C.'s definitive interpretation of its authority under the Interstate Commerce Act is contained in its *D.R.G.W.* decision.

The standard articulated by the I.C.C. in its *D.R.G.W.* decision is a clear one and is quoted by the Committee in its Opinion:

> "To the extent that existing working conditions and collective bargaining agreements *conflict with* a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction." *D.R.G.W.*, slip op. at 6 (emphasis added); Opinion at 17.

As the I.C.C. explained in its SupremeCourt reply brief in *B.L.E.* v. *I.C.C.*:

> "Section 11347 and the Commission's labor protective provisions preserve existing collective bargaining rights only to the extent that they do not *conflict with* implementation of anapproved transaction." Opinion at 33 (emphasis added).

Thus, the I.C.C. has definitively interpreted the I.C.A. and its own labor protective conditions as protecting existing collective bargaining agreements and existing working conditions only insofar as such agreements and conditions do not *conflict with* a carrier's proposed implementation of an I.C.C.-approved action such as the Waycross-Raceland consolidation. In the event of any such conflict, section 11341 (a) of the I.C.A. comes into play, and the conflicting limitation, regardless of its source, is superseded as a matter of law.

Notwithstanding its express recognition that it must "strictly follow" the I.C.C.'s interpretation and its quotation of the "conflict with" standard artculated by the Commission, the Committee errs at page 3[illegible] of its Opinion when



it creates the following additional condition for the supersession of the terms of existing collective bargaining agreements that conflict with the proposed implementation of a carrier action that has I.C.C. approval:

> "To the extent that terms of collective bargaining agreements and collective bargaining rights do not *thwart or substantially impede* the approved transaction, those agreements and rights are preserved. (Emphasis added.)

The Committee adopts this additional condition based on its erroneous determination that an "accommodation" is required between a proposed transaction and existing collective bargaining agreements and collective bargaining rights. Opinion at 33.

The Committee's stringent "thwart or substantially impede" condition is directly contrary to the "conflict with" standard articulated by the I.C.C. in *D.R.G.W.* Moreover, the Committee's conclusion that the I.C.C. has empowered it to engage in some sort of standardless balancing of the Carriers' right to implement the proposed transaction with the Carmen's asserted collective bargaining rights in order to achieve a "reasonable accommodation" is flatly inconsistent with the Commission's *D.R.G.W.* decision and its subsequent decision in *Maine Central.** The Committee's position improperly delegates unto itself the power to rewrite the transaction and make the business decision as to how the transaction should be structured.

In both *D.R.G.W.* and *Maine Central* the unions argued that existing collective bargaining agreements and working conditions could not be superseded because of the provisions in the Commission's labor protective conditions, such as those found in Article I, Sections 2 and 3 of the *New York Dock* Conditions, that preserve such agreements

---

* *Maine Central R.R. Co., Georgia Pacific Corp., Canadian Pacific Ltd. and Springfield Terminal Ry Co. – Exemption from 49 U.S.C. 11342 and 11343*, Finance Docket No. 30532 (1985).

and working conditions. The Commission flatly rejected this contention:

> "The labor conditions imposed under section 11347 preserve conditions and agreements *in the context of* the authorized transaction." *D.R.G.W.*, slip op. at 6 (emphasis added).*

In rejecting labor's argument, the Commission did not provide that any sort of "reasonable accommodation" of the proposed transaction with such agreements was appropriate or permissible. Nor did the Commission state that only those collective bargaining agreements that would go so far as to "thwart or substantially impede" the approved carrier action are superseded. Indeed, the Commission directed that,

> "To the extent that existing working conditions and collective bargaining agreements *conflict with* a transaction which we have approved, those conditions and agreements *must give way* to the implementation of the transaction." *D.R.G.W.*, slip op. at 6 (emphasis added).

Thus, the Commission has authoritatively interpreted I.C.A. Section 11341(a) and its own labor protection conditions as requiring the supersession of any terms of existing collective bargaining agreements that *conflict with* a proposed carrier implementation of an approved transaction. The carrier need not show that the proposed implementa-

---

* The Commission rejected a similar argument in *Maine Central*:

> "For the same reason we reject the argument that the provision of our conditions requiring that working conditions not be changed except pursuant to renegotiated collective bargaining agreements reinvigorates the RLA and causes its provisons to supersede the mechanism for resolving disputes associated with negotiating implementing agreements contained in the labor protective conditions we impose on approved transactions. *Maine Central*, slip op. at 7n. 11.



tion would be impossible or even extremely difficult absent freedom from contractual limitations. Such limitations "must give way," in the words of the I.C.C. in *D.R.G.W.*, whenever they "conflict with" the implementation of an approved transaction.

Had the Commission simply applied the "conflict with" standard as articulated by the I.C.C. in *D.R.G.W.*, it is apparent that it would have approved the Carrier's proposed implementing agreement and would have provided for the transfer of Orange Book-protected employees. The limitation on such a transfer that the Committee erroneously found in the Orange Book "conflicted with" Carriers' proposed implementation of the I.C.C.-approved transaction, since the transaction clearly included the transfer of Orange Book employees from Waycross to Raceland. The Orange Book prohibition that would restrict the Carriers from being able to transfer Orange Book employees with their work to Raceland clearly conflicts with the approved transaction.

The impact of the Committee's error in interpreting its own authority is severe. Carriers proposed to establish 86 carmen positions at Raceland. Of the 86 Waycross carmen who should be required to follow their work to Raceland, 57 have Orange Book protection. Under the Committee's award, these 57 Waycross employees can refuse to accept positions at Raceland, and continue to receive full pay despite the authorized transfer of their heavy repair work to Raceland. The Committee is in error when it claims at p. 37 of its Opinion that some of those employees could exercise seniority to remaining positions at Waycross. After the transfer of the work, there will be no existing positions at Waycross to which these 57 carmen can exercise seniority. The annual cost of carrying these 57 Orange Book employees on the payroll is *well in excess of $2 million*. In cavalier fashion, the Committee finds at page 37 that this burden "will only slightly impair the transaction." In fact, the Committee's conclusion presents a severe

conflict with implementation of the proposed coordination of repair work at Raceland.

As explained above, leaving in place the perceived limitation on the transfer of Orange Book employees will impose enormous costs on the Carriers that will substantially diminish, if not wholly consume, the economies and operating efficiencies associated with the proposed shop consolidation. Under any definition, such a limitation will "substantially impede" the authorized transaction, and cannot represent a "reasonable accommodation" of the transaction and the perceived Orange Book restriction. Thus, even if the additional condition applied by the Committee – that only those contractual limitations that would "thwart or substantially impede" an approved carrier action must "give way" – is a correct interpretation of the Interstate Commerce Act and the *New York Dock* Conditions, the Committee erred in its application of that additional condition in this case.

This nation's transportation policy has for decades been to foster and encourage the consolidation of rail carriers so as to obtain economies and efficiencies in furtherance of the public interest. Congress, through the Interstate Commerce Act, and the ICC have declared that legal and contractual impediments that conflict with the implementation of such consolidations must give way. The Committee's failure to follow the "conflict with" standard of the ICC and its refusal to supersede the perceived Orange Book limitation are flatly inconsistent with the underlying purpose of the Interstate Commerce Act and the ICC's consolidation approval in *CSX-Control*.

Accordingly, I dissent from paragraphs 2(b), 4, and that portion of paragraph 6 that incorporates paragraph 2(b) of the Committee's Award and Order.

/s/ J. T. WILLIAMS
J. T. WILLIAMS
Carriers' Member



## DISSENT OF EMPLOYEES' MEMBER

I dissent from the award and each material finding and conclusion contained in the Majority Opinion except that which affords the employees their Orange Book protection, however, I dissent from the Majority Opinion's reservations regarding even that protection.

The opinion and award in this case commit three egregious errors, all of which were called to the Neutral Member's attention and all of which were distainfully rejected or ignored.

With this decision we have almost reached the nadir in the application of what may now be ludicrously referred to as "employee protective" conditions. The Commission at one time agreed with the Congress and the courts that it could not inject itself into the area of labor relations except to the extent Congress permitted it to do so in protecting the monetary and contractual rights of employees affected by "actions taken pursuant to authorizations of the Commission." The Commission emphasized the protections it had designed as being "imposed upon railroads" for the "protection of employees".

The Commission, in the opinion of this Member, has irresponsibly strayed from the path it formerly travelled with regard to labor relations. However, no Commission ruling has gone so far to destroy the Railway Labor Act and collective bargaining agreement rights of employees as has the Neutral and Carriers' Members of this Committee in their decision in this case.

In every case in which the Commission has *held* it can supersede Railway Labor Act and collective bargaining agreement rights of employees by virtue of the existence of Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. §11341(a), it has done so based upon a claim that the specific carrier "action " had been presented to and 'approved" by the Commission in its approval of the financial transaction presented to it, e.g., a crew assignment provision in an ICC-approved trackage rights agreement.

The carrier "action" proposed here was never presented to or considered by the Commission. The Commission did not "approve" it. The only provisions in the Commission's orders affecting this case are contained in Sections 2 and 3 of the *New York Dock* conditions prohibiting interference with employee Railway Labor Act and collective bargaining agreement rights which sections the Majority Opinion herein considers ineffective.

The most basic and material error contained in the opinion, an error rendering invalid the entire proceeding, is factual and cannot be disputed. Section 4 of *New York Dock* requires a carrier to provide the representatives of their employees "a full and adequate statement of the changes to be effected." It cannot be reasonably disputed that the carriers' notice in this case did not satisfy that requirement. The BRC, as the employees' representative, had "heard" that some work in the Waycross shop was to be transferred to "some point" other than Raceland and sought to find out from the carrier the amount and identity of the work to be moved to Raceland but were rebuffed. [BRC-Div. of BRAC Submission, p. 20]

Following the hearing in the instant case, an injunction proceeding was brought in the U.S. District Court and during the course of a hearing before that Court it developed that the hopper car work which had been performed at Waycross for many years and constituted fully 50% of the "freight car heavy repair work" at Waycross was being transferred to Tampa. In a letter addressed to William G. Mahoney, Attorney for BRC Division of BRAC, and James D. Tomola, Attorney for CSX, the Neutral and Carriers' Members rejected BRC's request for the reopening of this proceeding in order to receive the new evidence developed before the federal court on the ground that "the work is a special covered hopper car program" (apparently the Carriers' Member so informed the Neutral Member after the hearing and the Neutral Member took him at his word) and because "the organization was aware before the arbitration hearing that this work was being transferred to



Tampa", referring to page 20 of BRC's Submission. But the statement on page 20 merely emphasizes the inadequacy of the carriers' notice. Certainly, there is no indication on that, or any other page of its Submission that BRC knew before the arbitration hearing that 50% of the freight car heavy repair work was being transferred to Tampa. (A copy of the letter rejecting the BRC's Motion to Reopen and a copy of the page 20 relied upon by the Neutral and Carriers' Members is appended to this dissent.)

The Notice of August 29, 1986 was inadequate and misleading, because it clearly indicated and led the BRC *and the Neutral* to believe that *all* freight car heavy repair work was being transferred from Waycross to Raceland at a time when fully one-half of it was being transferred to Tampa. Indeed, as noted below, the Majority Opinion relies heavily on this factual error. Therefore, the entire proceeding should have been ruled invalid, or at the very least, the proceeding should have been reopened to permit the issue of the Tampa work to have been fully developed. If that opportunity had been afforded BRC, it could have been demonstrated that the "work [was not] a special covered hopper car program" as found by the Neutral and the Carriers' Members in the letter of March 20, 1987, appended hereto, and that the work comprised at least 50% of the freight car heavy repair work being transferred.

The Majority Opinion confirms that it is based upon a substantial and substantive factual error, viz, that *all* freight car heavy repair work was being transferred to Raceland. At page 29, the Neutral and Carriers' Members find that the notice satisfied Section 4 and because "*all* freight car heavy repair work will be transferred to Raceland and thus, the Carriers did not have to quantitatively or qualitatively describe the freight car repair work" in their Section 4 notice. Of course, one-half of the freight car repair work was being transferred to Tampa rendering the foregoing factual finding clearly in error.

At page 34 of the Majority Opinion, it is found that the arbitration committee "has jurisdiction to formulate an implementing agreement governing the transfer of work and employees from Waycross to Raceland." No mention is made of the fact that one-half of that work has now been transferred to Tampa.

At page 37, in determining that it has the right to supersede the Railway Labor Act and collective bargaining agreement rights of the employees, the Majority of the Committee finds: "Otherwise the Carriers would be effectively thwarted from transferring *all* the Waycross freight car heavy repair work to Raceland." And, again at page 38, the Neutral and Carriers' Members of the Committee determined that the agreement they shall write and impose upon the employees "shall provide, without restriction, for the transfer of *all* freight car heavy repair work from Waycross to Raceland."

The repeated findings of fact that "all freight car heavy repair work" was going to be transferred from Waycross to Raceland is simply erroneous. The statement on page 20 of the Submission, appended hereto, as well as the notice and the findings of fact on "all " work dramatize the inadequacy of the notice and the basic unfairness demonstrated by the Neutral and Carriers' Members in this case in refusing to reopen this proceeding to review the facts which contradict the findings and by the Neutral Member's acceptance of an unsubstantiated statement that the "work is a special covered hopper car repair program."

The Majority of the Committee conclude at page 31 that "transactions leading to more efficient operations frequently contradict the Railway Labor Act's policy of avoiding disruptions to interstate commerce by promoting collective bargaining." The decision then goes on to conclude that the two Acts are not to be accommodated to each other but that in every case where some efficiency is employed by a carrier following a control or merger approval by the ICC, and whether or not it was brought to the attention



of the ICC and whether or not the Interstate Commerce Act gave the ICC independent authority to approve it, the Railway Labor Act must give way to the railroad's desires.

The Interstate Commerce Act, of course, does *not* empower the ICC to approve or disapprove yard or shop consolidations. When operational changes, such as yard or shop consolidation not under ICC jurisdiction, are presented to the ICC during the course of a merger or control proceeding, the ICC looks at them only insofar as they might render the transaction before it consistent or inconsistent with the public interest. The ICC has no independent statutory jurisdiction over such activity. The carriers do not require ICC authority prior to the consolidation of yards or shops whether such consolidations are intra- or inter-carrier. (Obviously, inter-carrier consolidations of shops would make little economic or operational sense unless the carriers involved were already under common control.)

If the ICC did not review a particular consolidation during a control or merger proceeding prior to approving the merger or control, it cannot thereafter approve or disapprove it under the Interstate Commerce Act. The carrier could not "constantly return to the ICC to receive approval" for each and every change made pursuant to the ICC's original order about which the Majority lavishes such concern at pages 32-33 of its opinion, simply because the I.C.C. does not have the statutory authority to approve such consolidations.

If the Interstate Commerce Act contains no ICC authority to approve a shop consolidation such as that described in the notice issued in this proceeding, then that Act cannot possibly be in conflict with the provisions of the Railway Labor Act much less prevail over the Railway Labor Act in an area which the Interstate Commerce Act does not even attempt to regulate.

The Majority Opinion is clear in its conclusion that all collective bargaining agreements, even pre-existing

employee protection agreements executed in earlier merger cases with the same carriers, are eliminated by the "ICC authorized transaction" if they "operate to completely bar the transaction". (Majority Opinion, page 37.)

The opinion, however, uses such vague, general and undefined terms as to render extinct the Railway Labor Act rights of employees in all cases.

At page 33, for example, the ICC is quoted as stating that the Section 11341(a) "exemption arises automatically to cover 'anything authorized or required' by the order. " The conclusion is then reached that "the Raceland coordination is an approved transaction exempt from the Railway Labor Act." Aside from the fact that the ICC has no statutory authority to approve the "Raceland coordination" after it has approved a transaction of which the coordination may be a result, the Majority Opinion concludes [page 33] that §11341(a) "is only triggered when necessary." The implication here, therefore, is clear that the "Raceland coordination" is "necessary" because the "Raceland coordination" is repeatedly referred to as an "approved" or "authorized transaction" [see pp. 33, 37].

The "Raceland coordination" was not approved during the course of the control case before the Commission because it was never presented to the ICC. The ICC could not now approve the "Raceland coordination" because it is not given jurisdiction over shop consolidations by the Interstate Commerce Act. Therefore, the implication plainly arises from the Majority Opinion that *any* action or activity that meets the definition of a "transaction" as found in Section 1(a) of *New York Dock* is immunized from the provisions of the Railway Labor Act and only "if feasible", whatever that may mean, "the transaction should reasonably accommodate existing collective bargaining agreements and collective bargaining rights" [pg. 33].

At pages 34-37, the Majority Opinion recognizes the transfer restrictions which Section 3(a) places upon the carriers [Majority Opinion, pg. 36] and acknowledges that



"given the mandate in Section 11347, there is some doubt that Section 11341(a) exempts *New York Dock* transactions from conflicting terms in prior merger protective agreements" and that "the ICC has not addressed this dilemma" [pg. 34]. However, the Majority Opinion then dismisses the specific requirement of Section 3 of *New York Dock* which preserves to an employee "the rights or benefits . . . which such employee may have under any existing job security agreement", such as the Orange Book in this proceeding, and which expresaly provides that employee an unlimited election "between the benefits under this appendix [*New York Dock*] and similar benefits under such other arrangement", with the statement that "the ICC has emphasized that a transaction hurdles all legal obstacles preventing implementation." [Pg. 34.]

The Majority Opinion then observes that "most rights and benefits preserved to employees under Section 3 of the New York Dock conditions will be safeguarded through prudent applications of the reasonable accommodation standard" [pg. 34] but, later concludes that the "ICC's authorized transaction would be paramount to Orange Book Section 3(a)" if it "would operate to completely bar the transaction" [pg. 37]. No indication is given of what might be considered a "complete bar to the transaction". Certainly, as applied by the Majority Opinion, the Orange Book could not bar the "Raceland coordination" even if all employees involved were covered by its provisions although such a coordination in those circumstances would cost the carrier more money. Apparently, the expenditure of money in the protection of the rights of the employees would constitute a "bar" to the transaction. This would seem to be a reasonable conclusion since prior to the "Raceland coordination" the Orange Book had never been a "bar" because exemptions have always been negotiated permitting transfers. Now apparently they are all to be arbitrated because of this purported "bar" found by the Majority.

Because of its misuse of terms; its vague use of terms; and, its conclusions in contradiction of the facts, this

Majority Opinion will be utilized by all carriers in future proceedings in attempts to strip the Railway Labor Act rights and collective bargaining agreement rights of every employee involved in a coordination since apparently any efficiency or convenience of operations made attractive by a merger or common control of a carrier can be carried out as if it had been "authorized and approved" in advance by the ICC even where the ICC has been given no statutory jurisdiction to approve or authorize that particular activity or even has been made aware such activity may ever occur.

For the foregoing reasons, the Employees' Member of the Arbitration Committee dissents from an unfair, inequitable, and flagrantly erroneous majority opinion and award in this proceeding.

/s/ R.P. Wojtowicz
R.P. Wojtowicz
Employees' Member



## CARRIERS' MEMBERS' REPLY TO DISSENT OF EMPLOYEES' MEMBER

1. The Employees' Member in his Dissent claims that the Committee erra in finding the Carriers' notice to be adequate and in failing to grant the Carmen's motion to reopen the hearing based on alleged discovery of new evidence. The adequacy of notice issue is a red herring that simply reflects the Carmen's continuing efforts to block the transaction through any means possible, however remote.

The Employees' Member's Dissent is based on a manifest misreading of the Carriers' written notice of the transaction that was provided to the Carmen on August 29, 1986. That notice clearly indicated that on or about December 31, 1986, the Waycross freight car heavy repair shop would be closed, and that all freight car heavy repair work and certain storeroom work then to be performed at Waycross would be transferred to Raceland, Kentucky. The notice indicated, by craft, the number of positions that the Carriers expected would be abolished at Waycross, and the number of positions that would be established at Raceland as a result of this transaction. The Carmen responded just four days later indicating that they would attempt to block the transaction and claiming, among other things, that the notice was inadequate.

The Employees' Member's Dissent misreads the notice and misrepresents the transaction by focusing on a particular covered hopper repair program that was to be performed at Tampa rather than at Waycross in 1987. Both the Neutral and the Carmen clearly understood that under the notice such work was not to be transferred to Raceland because the notice encompassed all work to be performed at Waycross at the expected time of implementation of the transaction in 1987. Indeed, the Carmen's prehearing Sub mission acknowledges at p. 20 that they were specifically informed during negotiations that the transfer to Raceland

included all heavy repair work otherwise to be performed at Waycross in 1987.

The Committee properly concluded at p. 29 that, since Waycross would be closed and all future Waycross heavy repair work would be transferred to Raceland, "the Carriers did not have to quantitatively or qualitatively describe the freight car repair work." More significantly, the Committee properly found that the notice requirement was met by the Carriers' good faith estimate of the number of employees that would be required to perform the quantum of work that would be transferred to Raceland. "Also the Carriers in good faith, estimated the number of employees in each class who would be involved in the force rearrangement. The notice laid the groundwork for meaningful negotiations. The Organization can hardly contend that it was ill-prepared for bargaining." Opinion at 29.

The Employees' Member's Dissent at p. 4 erroneously suggestes that the Carmen and the Neutral were somehow misled and that a factural error underlies the Committee's Opinion. No factual error has been made. The transaction always contemplated, and the Carmen and the Neutral clearly understood, that all heavy repair work that would have been performed at Waycross in 1987 was to be transferred to Raceland.

As recognized by the Committee, the Carmen's immediate and adamant opposition to the transaction in its entirety exposes its claim of notice deficencies as simple obstructionism; the Carmen knew immediately what the proposed transaction involved and decided to attempt to block the transaction in any way possible.

The Carmen continued their obstructionist tactics with a last minute request to reopen the aritration hearing based on alleged discovery of new evidece – the alleged transfer of covered hopper repair work from Waycross to Tampa – at a court hearing on January 9, 1987. The Employees' Member's Dissent completey misrepresents the facts and the basis for denial of that motion.



Carriers responded to the Carmen's motion by letter (copy attached hereto) which showed that no new evidence was discovered on January 9 that would justify reopening the hearing. Specifically, Carriers' letter informed the Committee that BRC General Chairman McAlpine testified on January 9 that he was aware of the alleged transfer of repair work from Waycross to Tampa no later than September 10, 1986, more than three months prior to the arbitration. Further, Carriers explained that the subject of the 1987 Tampa covered hopper repair program was raised by the Carmen and fully explained by Carriers officials at an October 1, 1986 meeting, more than two months prior to the arbitration. Carriers' letter stated that at the October 1 meeting, "Carriers' officials clearly and unequivocally explained that a covered hopper repair program was being assigned to Tampa for 1987, that Carriers had the right to determine where this repair program would be performed, that it had been performed at Tampa in the recent past, and that this program was not part of the 1987 car repair work at Waycross which was being transferred to Raceland." The Carmen could not and did not deny these facts in response to Carriers' letter. To the contrary, General Chairmen McAlpine testified in court that Tampa had historically performed repair programs on the same type cars as Waycross and that the Carriers had the right to determine whether a particular car repair program would be assigned to Tampa or Waycross.

The Carmen's knowledge of the 1987 Tampa repair program and their arguments based on the transfer of work from Waycross to Tampa are reflected in the Carmen's initial Submission to the Committee at p. 20. Thus, the conclusion of the Committee in its March 23 letter that freight car repair work going to Tampa is not new evidence justifying a reconsideration of the adequacy of the Carriers' notice is entirely proper.

The Carmen had more than adequate opportunity to challenge the Carriers' notice at the December 18 hearing based on the 1987 Tampa hopper repair program, which

they admittedly were aware of no later than September 10, 1986. That program represents work that would not be performed at Waycross in 1987, regardless of any transfer of Waycross positions to Raceland. The Carmen's allegation that 50% of 1986 Waycross work was being transferred to Tampa was unsubstantiated and erroneous, did not represent new evidence, was irrelevant to the adequacy of Carriers' notice, and afforded no basis for reopening the arbitration hearing.

2. It is apparent from the Employees' Member's Dissent that his primary dispute in the remaining portions of his Dissent is with the decisions of the Interstate Commerce Commission that have ruled that the Railway Labor Act and provisios of private collective bargaining agreements must "give way" when they "conflict with" the proposed implementation of an approved carrier consolidation or merger. He states in his dissent at p. 1: "The Commission, in the opinion of this Member, has irresponsibly strayed from the path it formerly travelled with regard to labor relations." The Committee properly recognized, however, that as an arm of the I.C.C. performing functions delegated to it under Article I, Section 4 of the *New York Dock* Conditions, this Committee was bound to adhere strictly to the Commission's interpretation of the Interstate Commerce Act and *New York Dock*.

The Employees' Member goes further, however, and accuses the Committee of improperly expanding the Commission's decisions to include situations where the carrier action allegedly "was never presented to or considered by the Commission." This charge is based on both an inaccurate factual premise and on a fundamental misunderstanding of the authority conferred on these Carriers in *CSX – Control*.

First, as the Committee's decision notes, the Carmen acknowledged during the proceedings before the Committee that the proposed shop consolidation here was a "transaction" within the meaning of *New York Dock* and that



this carrier action was, accordingly, taken pursuant to the authority the Commission conferred on the Carriers to create a single, consolidated rail system in *CSX – Control*.

BRC's admission is conclusive in this case. Since the shop consolidation is a *New York Dock* transaction, it is a transaction authorized by the I.C.C.; *i.e.*, it is admittedly an "action taken pursuant to authorizations of this Commission in which these provisions have been imposed." As an authorized transaction, the shop consolidation is governed by the I.C.C. policy atriculated in *D.R.G.W.* and *Maine Central* whereby collective bargaining agreements and Railway Labor Act rights are superseded to the extent they conflict with the authorized transaction. In view of the Carmen's admission, the scope of the authority conferred by the Commission on the Carriers in *CAX – Control* and the legal consequences that flow therefrom, whether or not the shop consolidation was specifically presented to or considered by the I.C.C. is simply not relevant.

Second, although the precise consolidation of the Waycross and Raceland shops now proposed was not identified in the short-term operating plan presented to the Commission in *CSX – Control*, the record in the proceedings before the Commission was replete with references to the acknowledged fact that, following the grant of control authority, the Carriers would engage in such consolidations where deemed to be economic and cost-efficient. Indeed, as Carriers demonstrated at pp. 16-21 of their initial submission, representatives of rail labor repeatedly stressed to the Commission that such consolidations would occur. Thus, the fact that there would be future consolidations was indeed "presented to" the Commission.

Third, the Commission clearly "considered" such long-term consolidations and the effects on employees in its decision in *CSX – Control*. As set forth at pp. 22-23 of Carriers' submission, the Commission acknowledged that "additional coordinations may occur that could lead to further employee displacements" but concluded that its standard

labor protection condition "will adequately protect those employees now identified as affected by the consolidation as well as those who may be affected in the future, but are not now identified specifically." *CSX – Control*, 363 I.C.C. at 589.

Thus, in approving the establishment of a single, consolidated CSX rail system, the Commission clearly found that not only the immediate consolidation of facilities and coordination of operations described in Carriers' short-term operating plan but also the long-term implementation of "additional coordinations" was in the public interest. In granting control authority, the Commission found it to be in the public interest that the Carriers be managed with "fully coordinated or integrated facilities and operations." *Peoria & E.Ry. Co. Stockholders v. New York Central R.R. Co.*, 334 I.C.C. 131, 151 (1968).

The attempt by the Employees' Member to draw a line between those facility consolidation that are specifically referred to in the short-term operating plan (and that, accordingly, can be carried out notwithstanding the RLA and any limitations in existing collective bargaining agreements) and those that are encompassed within or are pursuant to the control authority but are proposed some time after the I.C.C. proceedings are completed (and that, according to the union, can be carried out only after obtaining the union's permission through the long, drawn-out negotiating processes of the RLA) is a specious one that has no basis in the terms of the I.C.A. or prior I.C.C. decisions and indeed is inconsistent with the Carmen's admission that the Waycross-Raceland consolidation constitutes a *New York Dock* transaction under *CSX – Control*.

/s/ J. T. Williams
J. T. Williams
Carriers' Member



## RESPONSE TO DISSENT

The Neutral Member of this Committee has invited each partisan member of the Committee to respond to the dissent of the other partisan member. I believe such responses to be novel, inappropriate, if not improper, and to serve no constructive purpose. Consequently, I will not respond to the dissent filed herein by the Carriers' partisan member of this Committee.

/s/ R. P. Wojtowicz
R. P. Wojtowicz

**Transportation Act of 1920, § 407, 41 Stat. 480:**

Sec. 407. The first paragraph of section 5 of the Interstate Commerce Act is hereby amended to read as follows:

• • •

(8) The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order shall be, and they are hereby, relieved from the operation of the "antitrust laws," as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

**Emergency Railroad Transportation Act of 1933**

**Title I, § 10(a), 48 Stat. 215:**

Sec. 10. (a) The carriers or subsidiaries subject to the Interstate Commerce Act, as amended, affected by any order of the Coordinator or the Commission made pursuant to this title shall, so long as such order is in effect, be, and they are hereby, relieved from the operation of the antitrust laws, as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, other than such as are for the protection of the public health or safety, in so far as may be necessary to enable them to do anything authorized or required by such order made pursuant to this title: *Provided, however,* That nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act.



**Title II, § 202, 48 Stat. 217-19:**

Sec. 202. Such section 5 is further amended by striking out paragraphs (6), (7), and (8), and by inserting in lieu thereof the following paragraphs:

• • •

(15) The carriers and any corporation affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the antitrust laws as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order.

**Transportation Act of 1940, § 7, 54 Stat. 908-09:**

Sec. 7. Section 5 of the Interstate Commerce Act, as amended, is amended to read as follows:

• • •

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporation, and their officers and

employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

Supreme Court, U.S.
FILED
FEB 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3) (4)

Nos. 89-1027 and 89-1028

# In the Supreme Court of the United States

OCTOBER TERM, 1989

---

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.,
PETITIONERS

*v.*

AMERICAN TRAIN DISPATCHERS ASSOCIATION, ET AL.

---

CSX TRANSPORTATION, INC., PETITIONER

*v.*

BROTHERHOOD OF RAILWAY CARMEN, ET AL.

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

---

JOHN G. ROBERTS, JR.
*Acting Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

ROBERT S. BURK
*General Counsel*
HENRI F. RUSH
*Deputy General Counsel*
JOHN J. MCCARTHY, JR.
*Deputy Associate General Counsel*
*Interstate Commerce Commission*
*Washington, D.C. 20423*

## QUESTION PRESENTED

Whether, under 49 U.S.C. 11341(a), a party that has entered into a merger approved by the Interstate Commerce Commission is exempt from provisions of a collective bargaining agreement that may jeopardize the implementation of the merger.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Statement | 2 |
| A. Statutory framework | 2 |
| B. Proceedings below | 3 |
| 1. No. 89-1027 | 3 |
| 2. No. 89-1028 | 5 |
| 3. The court of appeals' decision | 8 |
| Argument | 11 |
| Conclusion | 12 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, ICC Dec. Finance Doc. No. 28,905 (Sub No. 22) (Aug. 31, 1989) | 10 |
| *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60, aff'd, 609 F.2d 83 (2d Cir. 1979) | 2-3 |
| *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Assn'n*, 109 S. Ct. 2584 (1989) | 9 |


Statutes:


| | |
|---|---|
| Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*: | |
| 49 U.S.C. 11341 | 2 |
| 49 U.S.C. 11341(a) | 3, 8, 10, 11 |
| 49 U.S.C. 11343 | 2, 10 |
| 49 U.S.C. 11344 | 2 |
| 49 U.S.C. 11344(c) | 2 |
| 49 U.S.C. 11347 | 2, 6, 11 |
| Railway Labor Act, 45 U.S.C. 151 *et seq.* | 4 |

# In the Supreme Court of the United States

OCTOBER TERM, 1989

---

No. 89-1027

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL., PETITIONERS

*v.*

AMERICAN TRAIN DISPATCHERS ASSOCIATION, ET AL.

---

No. 89-1028

CSX TRANSPORTATION, INC., PETITIONER

*v.*

BROTHERHOOD OF RAILWAY CARMEN, ET AL.

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 880 F.2d 562.[1] The court of appeals' order of September 29, 1989, amending its prior opinion is unreported (Pet. App. 27a-28a). The opinion of the In-

[1] References to "Pet. App." are to the appendix to the petition in No. 89-1027.

terstate Commerce Commission in No. 89-1027 (Pet. App. 29a-46a) is unreported, while the Commission's opinion in No. 89-1028 (89-1028 Pet. App. 33a-52a) is reported at 4 I.C.C.2d 641.

## JURISDICTION

The judgment of the court of appeals was entered on July 25, 1989. Petitions for rehearing in both cases were denied on September 29, 1989 (Pet. App. 49a-50a). The petitions for a writ of certiorari in both cases were filed on December 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

### A. Statutory Framework

Sections 11341 and 11344 of the Interstate Commerce Act (Act), 49 U.S.C. 11341, 11344, generally require that covered rail carriers secure the approval of the Interstate Commerce Commission (ICC) before conducting specified transactions, including mergers (see 49 U.S.C. 11343). Under Section 11344(c), the ICC must approve any such merger proposal "when it finds the transaction is consistent with the public interest."

Pursuant to Section 11347 of the Act, 49 U.S.C. 11347, the ICC imposes upon the parties a set of labor-protective conditions. Those conditions, derived from the Commission's decision in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90, aff'd, 609 F.2d 83 (2d Cir. 1979), establish, among other things, procedures for the resolution—by means of negotiation and, failing that, binding arbitration—of labor disputes arising from ICC-approved railroad consolidations. Accordingly, Section 4 of



the *New York Dock* conditions, 360 I.C.C. at 84, requires a "railroad contemplating a transaction which . . . may cause the dismissal or displacement of any employees, or rearrangement of forces [to] give at least ninety . . . days written notice. . ." (Pet. App. 3a). Section 2, 360 I.C.C. at 85, provides that "[t]he rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements" (Pet. App. 3a-4a).

Finally, Section 11341(a), the so-called immunity provision, provides that upon ICC approval of a Section 11343 transaction:

> A carrier * * * participating in that approved * * * transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

### B. Proceedings Below

#### 1. *No. 89-1027*

a. In March 1982, the ICC approved the application of NWS Enterprises, Inc. (now Norfolk Southern, or NS), a holding company, to acquire control of two rail carriers, petitioners Norfolk and Western Railway Company (N & W) and Southern Railway Company (Southern). In its order approving control, the ICC imposed the standard *New York Dock* labor-protective conditions. Pet. App. 6a.

Respondent American Train Dispatchers' Association (the Association) was the bargaining representative of certain N & W employees responsible for "power distribution"—the process by which locomotives are assigned to particular

trains and facilities. In September 1986, petitioners informed the Association that they intended to consolidate all power distribution for the combined Norfolk Southern operation by transferring the work performed at the N & W power distribution center in Roanoke, Virginia, to the Southern center in Atlanta, Georgia. The carriers proposed that affected N & W employees would be "given consideration" for employment in new positions as superintendents in Atlanta. Superintendents in Atlanta were considered management, however, and were therefore not covered by any collective bargaining agreement. Pet. App. 6a-7a.

The Association thereafter sought to negotiate the terms under which the proposed transfer would be implemented. The negotiations foundered, however, over the Association's contentions that (1) the carriers' proposal was subject to mandatory bargaining under the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*; (2) the carriers were required to preserve the right of the transferred employees to representation under the RLA; and (3) the affected employees were entitled to retain their rights, including their seniority rights, under the collective bargaining agreement with N & W. The carriers then asked the National Mediation Board to appoint an arbitrator pursuant to Section 4 of the *New York Dock* conditions. Pet. App. 7a.

The dispute thereafter came before a three-member arbitration committee, which ruled in favor of the carriers on each of the disputed issues. The committee concluded that (1) it had the authority to abrogate any provision of a collective bargaining agreement or of the Railway Labor Act that impeded implementation of the ICC-approved merger between N & W and Southern; (2) the transfer of power distribution functions was part of the control transaction approved by the ICC; and (3) transferred employees could not retain their rights under the collective bargaining agreement. Pet. App. 7a.



b. The Commission affirmed by a divided vote (Pet. App. 29a-46a). It explained that "[i]t has long been the Commission's view that private collective bargaining agreements and RLA provisions must give way to the Commission-mandated procedures of section 4 [of the *New York Dock* conditions] when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission" (*id.* at 33a). Accordingly, the Commission stated, "the panel correctly found * * * that * * * the compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements" (*id.* at 35a). Moreover, the ICC added, because the proposed transfer was incident to the merger approved by the Commission, it was "immunized from conflicting laws by section 11341(a)" (*ibid.*). Finally, the Commission upheld as appropriate the decision to override the collective bargaining agreement and the RLA provisions. Reviewing the record, the Commission noted that "[i]mposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function" (*id.* at 37a).[2]

2. *No. 89-1028*

a. In 1980, the ICC approved a proposal under which CSX Corporation would acquire control of two other holding companies: (1) the Chessie System, Inc., whose prin-

[2] Commissioner Lamboley dissented (Pet. App. 42a-46a). In his view, the case should have been remanded to the arbitration panel for a determination of whether, and to what extent, the provisions of the collective bargaining agreement could have been accommodated, consistent with the goal of completing the approved transfer.

cipal railroad subsidiaries were the Chesapeake and Ohio Railway Company and the Baltimore and Ohio Railroad Company; and (2) Seaboard Coast Line Industries, Inc., the parent of the Seaboard Coast Railroad (later to become petitioner, CSX Transportation, Inc.). As required by Section 11347 of the Act, the Commission imposed a standard set of labor protective conditions, derived from *New York Dock*. Pet. App. 3a-4a.

At the time of the consolidation, Chessie operated a heavy freight car repair shop in Raceland, Kentucky, and Seaboard operated a similar shop in Waycross, Georgia. In 1986, CSX, invoking Section 4 of the *New York Dock* conditions, notified the respondent labor organizations that it intended to close the Waycross shop and to transfer the employees and the work from that shop to the Raceland shop. The transfer was to result in a net decrease in available jobs at the two shops. Pet. App. 4a.

Relations between CSX and the unions representing its employees were governed at the time by a collective bargaining agreement known as the "Orange Book," negotiated to implement a previously authorized merger. The Orange Book provided, among other things, that the carrier would employ each covered employee for the remainder of his working life, and that no covered employee "shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment." In return for that job protection, the Orange Book gave the carrier the right "to transfer the work of the employees protected [t]hereunder throughout the merged or consolidated system * * *." Pet. App. 4a.

Once notified of the proposed transfer of work and employees, respondent Brotherhood of Railway Carmen (the Brotherhood) attempted to negotiate an implementation agreement on behalf of the affected employees. Negotiations foundered, however, due to disagreements about (1) whether the displaced Waycross employees would retain their Orange Book rights; and (2) whether the proposed transfer would result in a change of working conditions and, if so, whether CSX would be required to comply with the Railway Labor Act before effecting such a change. CSX invoked arbitration under the *New York Dock* conditions, and the matter came before a three-member arbitration panel. Pet. App. 4a-5a.



The arbitration panel concluded that the Orange Book prohibited the proposed transfer of work and employees. The panel stated, however, that as an "extension of the ICC," it had the authority to abrogate any Orange Book provision, and to relieve CSX from any requirement of the RLA, that impeded the transfer decision. The panel then held that (1) it would abrogate the Orange Book prohibition on the transfer of work, but not on the transfer of employees, and (2) it would exempt CSX from the RLA insofar as the statute might require the carrier to bargain before unilaterally changing the Orange Book with respect to the transfer. Pet. App. 5a-6a.

b. By a divided vote, the Commission affirmed in part and reversed in part (89-1028 Pet. App. 33a-52a). The Commission agreed that the arbitrators were "empowered to override collective bargaining rights, such as those in the Orange Book, and RLA rights in formulating the implementing agreement" (*id.* at 43a). But it rejected the panel's refusal to permit the transfer of employees to Raceland. The Commission reasoned that if, as the panel had found, the Orange Book prohibits such a transfer of employees, then to enforce the Orange Book in this setting would "serve[ ] as an impediment to implementation of a transaction authorized by the Commission" (*id.* at 44a). The Commission also found that, in light of the positions available at

Raceland and the number of Waycross employees eligible for those positions, "[i]mposition of an Orange Book employee exception would effectively prevent implementation of the proposed transaction" (*id.* at 45a). The Commission accordingly reversed the arbitrators' decision "to the extent it holds that CSX may not require transfer of [Seaboard] employees as well as work from Waycross to Raceland" (*id.* at 44a).[3]

3. *The Court of Appeals' Decision*

The court of appeals considered the two cases together and reversed and remanded (Pet. App. 1a-26a). The court held that Section 11341(a) of the Act does not authorize the Commission to relieve a party to a Section 11343 transaction of collective bargaining agreement provisions that impede implementation of the transaction. The court stated that the Commission's contrary view found "no support in the language of the statute," explaining that the phrase "other law" in Section 11341(a) cannot be read to include "all legal obstacles" (Pet. App. 12a). The court also found no evidence in the legislative history to support the Commission's construction of the statute. In the court's view, "Congress focused nearly exclusively * * * on specific types of laws it intended to eliminate – all of which were positive enactments, not common law rules of liability, as on a contract" (*id.* at 18a).

The court next "decline[d] to address the question" (Pet. App. 19a) whether Section 11341(a) may operate to over-

[3] Commissioner Lamboley dissented (89-1028 Pet. App. 46a-52a). He expressed "substantial doubt" that the proposed transfer of work and employees was a transaction authorized by the Commission's prior approval of the control by CSX of Chessie and Seaboard (*id.* at 46a). He also rejected the proposition that "*any* conflict, regardless of origin or degree, is an impediment pre-empted by [Interstate Commerce Act] provisions" (*id.* at 49a).



ride provisions of the RLA, choosing instead to remand that issue to the Commission. The court observed that the Commission's present position with respect to the RLA "depart[s] from its earlier precedent" (Pet. App. 23a), and it therefore directed the agency on remand either to "provide an explanation for its new position on that issue, or adhere to its prior position" (*id.* at 25a). The court also explained that, "[i]n light of [its] holding that § 11341(a) does not empower the ICC to override a [collective bargaining agreement], it is unclear what are the consequences, if any, of its rulings that the carriers need not comply with the RLA" (*id.* at 23a). Because of that "uncertainty as to the effects of [the] ruling on the continued vitality of the disputes," the court decided to remand the RLA issue to the Commission "to determine whether there is any live RLA issue remaining" (*id.* at 25a).

Finally, the court "decline[d] to address either the ICC's theory that the labor protective conditions required by § 11347 of the Act are exclusive, or its related assertion * * * that § 4 of the *New York Dock* conditions gives the arbitration committee the 'absolute right' to effectuate the transfer of employees, and to override any contrary provisions of a [collective bargaining agreement]" (Pet. App. 25a). In the court's view, the Commission had not raised those claims in its court of appeals' brief. "In any event," the court concluded (*id.* at 26a), it is "best for the ICC, if it has not abandoned its § 11347 and § 4 rationales altogether, to reconsider them in the first instance in light of" this Court's intervening decision in *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2584 (1989).

4. Pursuant to the court of appeals' remand order, the Commission thereafter determined that further hearings were necessary. By order served September 20, 1989, the Commission "reopen[ed] the[ ] proceedings so that [it] could address and explain in detail [its] views on the issue

specifically remanded; *i.e.*, whether the provisions of 49 U.S.C. 11341(a) operate to override the provisions of the Railway Labor Act (RLA), as well as on the general issues raised in these proceedings, particularly the impact of our approval of a transaction under 49 U.S.C. 11343 and imposition of our standard labor conditions upon the parties' rights and remedies under the RLA and with respect to existing collective bargaining agreements" (*CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, ICC Dec. Finance Doc. No. 28,905 (Sub No. 22) (Aug. 31, 1989) [hereinafter ICC Dec. Finance Doc. No. 28,905]). The Commission added that "[i]n light of the importance of the legal issues involved and [its] intention to conduct a comprehensive examination of [its] authority under 49 U.S.C. 11341, 11343, and 11347, etc., and the labor conditions [it] ha[s] customarily imposed in approving railroad consolidations," the agency was therefore "seeking further comment by the parties to these proceedings as well as any other interested parties" (*ibid.*).

The Commission also filed a "limited" petition for rehearing in the court of appeals. In it, the agency advised the court of its "intention to reopen these proceedings and to promptly issue a comprehensive decision on remand addressing issues [the agency] believe[s] the court directed [it] to reconsider and those left open for resolution in further proceedings." The Commission accordingly "requested that the court refrain from ruling on [the agency's] petition for rehearing until [the agency has] issued [its] decision on remand." ICC Dec. Finance Doc. No. 28,905.

On September 29, 1989, the court of appeals issued an order stating that the Commission's petition for rehearing would be "deferred pending release of the ICC's decision on remand" (Pet. App. 54a). Moreover, the court amended its decision to remand only the "records," thus retaining jurisdiction over the case (*id.* at 28a). Briefs by interested



parties have now been filed with the Commission, and the agency entertained oral argument on January 4, 1990.

## ARGUMENT

Petitioners challenge (89-1027 Pet. 10-24; 89-1028 Pet. 8-19) the court of appeals' decision holding that Section 11341(a) does not extend to provisions of a collective bargaining agreement. Although the Commission has differed with the court of appeals on that issue, we believe that, in light of the court's retention of jurisdiction and the ongoing proceedings before the Commission, the petitions for a writ of certiorari are premature and should not be granted.

The court of appeals remanded the record to the Commission to resolve a series of issues related to the scope of Section 11341(a). Pursuant to that order, the Commission is presently exploring a variety of alternative bases—left open by the court of appeals' decision—for allowing approved consolidations to go forward without resort to the extended bargaining procedures required by the RLA. It is entirely possible that the Commission will adopt a position on one or more of these alternatives that may obviate the difficulties entailed by the court of appeals' decision; at a minimum, the agency expects to create a fuller record on which to defend its decision if, and when, the case returns to the court of appeals.

In particular, the court of appeals expressly declined to address the Commission's arguments based on Section 11347 and on Section 4 of the *New York Dock* conditions, and also declined to decide whether Section 11341(a) contemplates that covered carriers may be exempted from the requirements of the RLA, including the provisions for resolution of disputes. Thus, the Commission's ultimate disposition of the case on remand may not be affected

by the court of appeals' present decision. Following that disposition, the court of appeals would have an opportunity to review the matter anew, in light of the reconsidered, and more fully elaborated, views of the Commission.

We believe that the proceedings on remand should be permitted to take their course. Should the court of appeals thereafter revisit the matter, it would do so on the basis of a more complete record and a better developed statement of the agency's position. If, at that point, review by this Court is warranted, the case should then present a more appropriate vehicle for resolution of the disputed issues.

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**

ROBERT S. BURK
*General Counsel*

HENRI F. RUSH
*Deputy General Counsel*

JOHN J. MCCARTHY, JR.
*Deputy Associate General Counsel*
*Interstate Commerce Commission*

FEBRUARY 1990

---

* The Solicitor General is disqualified in this case.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—262 203/00746

(4) (5)

Nos. 89-1027 and 89-1028

Supreme Court, U.S.
FILED
FEB 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

---

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
*Petitioners,*

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
*Respondents.*

---

CSX TRANSPORTATION, INC.,
*Petitioner,*

v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
*Respondents.*

---

**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## BRIEF FOR UNION RESPONDENTS IN OPPOSITION

---

WILLIAM G. MAHONEY
(Counsel of Record)
JOHN O'B. CLARKE, JR.
HIGHSAW, MAHONEY
& CLARKE, P.C.
Suite 210
1050 - 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500
*Attorneys for Union Respondents American Train Dispatchers Association and Brotherhood of Railway Carmen*

February 28, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

16 pp

## QUESTION PRESENTED

Whether a party that has consummated a transaction pursuant to Interstate Commerce Commission approval and authorization as provided in 49 U.S.C. 11343 and 11344 is exempt under 49 U.S.C. 11341(a) from provisions of collective bargaining agreements that may impede implementation of certain operational aspects of the consummated transaction?

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATEMENT | 2 |
| A. Statutes Involved | 2 |
| B. Proceedings Below | 3 |
| 1. No. 89-1027 | 3 |
| 2. No. 89-1028 | 5 |
| 3. The Court of Appeals' Decision | 8 |
| ARGUMENT | 11 |
| CONCLUSION | 12 |

## TABLE OF AUTHORITIES


*CASES RELIED UPON:* Page

*Brandywine Valley R.R. Co.—Purchase—Etc.*, 5 I.C.C.2d 764 (1989) ..... 9

*CSX Corporation-Control-Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, ICC Decision, Finance Docket No. 28905 (Sub-No. 22) (August 31, 1989) ..... 9

*New York Dock Ry.-Control-Brooklyn Eastern District Terminal*, 360 I.C.C. 60, *aff'd*, 609 F.2d 83 (2d Cir. 1979) ..... *passim*

*Pittsburgh & Lake Erie Railroad Company v. Railway Labor Executives' Association*, 491 U.S. ——, 109 S.Ct. 2584 (1989) ..... 9

*STATUTES AND OTHER MATERIALS:*

Interstate Commerce Act, 49 U.S.C. §§ 10101, *et seq.*

Section 11341(a), 49 U.S.C. § 11341(a) ..... *passim*

Section 11343(a), 49 U.S.C. § 11343(a) ..... 2

Section 11344, 49 U.S.C. § 11344 ..... 2

Section 11344(c), 49 U.S.C. § 11344(c) ..... 2

Section 11347, 49 U.S.C. § 11347 ..... 2, 5, 9, 11

Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* ..... *passim*

Section 2 Fourth, 45 U.S.C. § 152 Fourth ..... 4

Section 6, 45 U.S.C. § 156 ..... 6

28 U.S.C. § 1254(1) ..... 2

Supreme Court Rules

Rule 11 ..... 11


IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

---

Nos. 89-1027 and 89-1028

---

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
*Petitioners,*
v.
AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
*Respondents.*

---

CSX TRANSPORTATION, INC.,
*Petitioner,*
v.
BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
*Respondents.*

---

**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## BRIEF FOR UNION RESPONDENTS IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a)[1] is reported at 880 F.2d 562. The amendatory order of the court of appeals of September 29, 1989, is unreported. (Pet. App. 27a-28a.) The opinion of the Interstate Commerce Commission in No. 89-1027 (Pet. App. 29a-46a) is

---

[1] "Pet. App." references are to the appendix to the petition in No. 89-1027 unless otherwise indicated.

unreported, but the Commission's opinion in No. 89-1028 (No. 89-1028, Pet. App. 33a-52a) is reported at 4 I.C.C. 2d 641.

## JURISDICTION

The judgment of the court of appeals was entered on July 25, 1989. Petitions for rehearing were filed by CSX Transportation, Inc. and Norfolk and Western Railway Company and Southern Railway Company and were denied on September 29, 1989. (Pet. App. 49a-50a.) The petitions for a writ of certiorari in both cases were filed on December 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

### A. Statutes Involved

Section 11343(a) of the Interstate Commerce Act ("Act"), 49 U.S.C. 11343(a), lists six specifically described financial transactions that the Interstate Commerce Commission ("ICC" or "Commission") is authorized to approve. Section 11344, 49 U.S.C. 11344, requires ICC approval of such transactions upon application by a qualified applicant when the Commission "finds the transaction is consistent with the public interest", 49 U.S.C. 11344(c). Section 11343(a) of the Act, 49 U.S.C. 11343(a), prohibits carriers by railroad from engaging in such transactions absent ICC approval.

Section 11347 of the Act, 49 U.S.C. 11347, requires the Commission to impose "a fair arrangement" for the protection of the interests of employees who may be affected by the Commission's order of approval and specifies certain minimum protections which the Commission must impose as part of the "fair arrangement". The minimum statutory protections were developed in *New York Dock Ry.-Control-Brooklyn Eastern District Terminal*, 360 I.C.C. 60, *aff'd*, 609 F.2d 83 (2nd Cir. 1979). These conditions require a ninety-day written notice of any changes



which may affect employees and, before any such changes can occur, a voluntary or arbitrated implementing agreement must be reached with the representatives of affected employees on the selection of forces to perform the consolidated work and the assignment of employees to those forces. (Pet. App. 3a; No. 89-1028, Pet. App. 79a.) The minimum statutory conditions also require preservation of "rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . under applicable laws and/or existing collective bargaining agreements or otherwise . . . unless changed by future collective bargaining agreements." (Pet. App. 3a-4a.)

Section 11341(a), the focus of the court of appeals' decision, provides in part:

> A carrier . . . participating in that [approved] transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property and exercise control or franchises through the transaction.

### B. Proceedings Below

#### 1. *No. 89-1027*

Some four and one-half years after the Commission had approved and the applicants had consummated the control of the Norfolk and Western Railway Company ("N&W") and the Southern Railway Company ("Southern") by NWS Enterprises, Inc. (now "Norfolk Southern" or "NS"), a holding company, respondent American Train Dispatchers Association ("ATDA") was informed that N&W and Southern intended "to coordinate certain [N&W] work performed in the System Operations Center . . . in Roanoke, Virginia into the [Southern] Control Center in Atlanta, Georgia". (Pet. App. 6a-7a.)

The carriers sought to negotiate an implementing agreement under section 4 of the *New York Dock* conditions under which the N&W supervisors represented by ATDA in Roanoke would be "given consideration" for employment as superintendents in Atlanta with the Southern Railroad. On the Southern, however, these employees were considered management, not covered by a collective bargaining agreement and not represented by a union. Negotiations for an implementing agreement failed because of ATDA's position that (1) the carriers' proposal was subject to mandatory bargaining under the RLA; (2) the carriers were required to preserve the right of the transferred employees to representation under Railway Labor Act ("RLA") section 2 Fourth, 45 U.S.C. 152 Fourth; and (3) the affected employees were entitled to retain their rights, including their seniority rights, under the collective bargaining agreement ("CBA") with N&W. (Pet. App. 7a.) The carriers requested the appointment of an arbitrator by the National Mediation Board and after hearing, the three person arbitration panel concluded by a divided vote that (1) it had the power to abrogate any CBA or RLA provision that impeded implementation of the ICC-approved merger of the operations of the N&W and the Southern; (2) the transfer of locomotive power functions, though not specifically considered by the ICC in approving NS control of the railroad some four and a half years earlier, was part of the control transaction; and (3) because application of the N&W collective bargaining agreement to any superintendents at the Southern facility would somehow impede the transfer, the transferred employees could not retain their rights under that collective bargaining agreement. (Pet. App. 7a.)

By a divided vote, the Commission affirmed the arbitration panel. (Pet. App. 29a-46a.) The Commission expressed the "view that private collective bargaining agreements and RLA provisions must give way to the Commission-mandated procedures of section 4 when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission." (Pet. App. 33a.) The Commission held that, in accordance with that view, the panel had correctly found that Article I, section 2 of *New York Dock* which "requires that collective bargaining rights be preserved in a section 11343 transaction" (Pet. App. 33a) must give way to the "compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, . . . [which takes] precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements." (Pet. App. 35a.) The Commission finally concluded that the "[i]mposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function." (Pet. App. 37a.)[2]



### 2. *No. 89-1028*

In 1980, the ICC approved an application by CSX Corporation, Inc., a newly-formed holding company, to acquire control of two other holding companies: (1) the Chessie System, Inc., the principle railroad subsidiaries of which were the Chesapeake & Ohio Railroad Company ("C&O") and the Baltimore & Ohio Railroad Company ("B&O"); and (2) Seaboard Coast Line Industries, Inc., the parent of the Seaboard Coast Line Railroad ("Seaboard") (later to become CSX Transportation, Inc. or "CSX"). The ICC imposed upon those railroads the standard formula of employee-protective conditions as required by section 11347 of the Act, 49 U.S.C. 11347. (Pet. App. 3a.)

---

[2] The dissent of Commissioner Lamboley (Pet. App. 42a-46a) concludes *inter alia* that "no tribunal established under the ICA may claim authority to terminate representation rights" but, while both the arbitration panel and the majority of the Commission acknowledged their inability to "pre-empt RLA representation rights," each proceeded "to effectively terminate those rights". (Pet. App. 46a.)

Six years later CSX, invoking section 4 of the *New York Dock* conditions, notified respondent Brotherhood of Railway Carmen ("Carmen") that it intended to close its freight yard repair shop at Waycoss, Georgia and transfer the work performed there to the C&O repair shop at Raceland, Kentucky. Carmen attempted on behalf of affected employees to negotiate an agreement governing the changes that the Waycross-Raceland consolidation would require. (Pet. App. 4a.)

Relations between CSX and the unions representing many of its employees were governed by an agreement known as the "Orange Book" which had been negotiated in connection with a 1967 merger that created Seaboard from the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railroad Company. The Orange Book provided that the resulting carrier would employ each covered employee for the remainder of his working life, and that no covered employee "shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment period." In consideration for that job protection, the Orange Book gave the carrier the right "to transfer the work of the employees protected [t]hereunder throughout the merged or consolidated [*i.e.* Seaboard] System . . . ." (Pet. App. 4a.)

Negotiations between CSX and Carmen failed due to disagreements as to (1) whether displaced Waycross employees would retain their Orange Book right to lifetime income; and (2) whether (a) the Waycross-Raceland consolidation would result in a change in working conditions, and, if so, (b) CSX would be required to comply with the terms of section 6 of the RLA, 45 U.S.C. 156, and thus, to negotiate an agreement before effecting the proposed change. Arbitration was invoked under the *New York Dock* conditions and the matter came before an arbitration panel with the Carmen participating under



protest. (Pet. App. 5a.) The arbitration panel agreed with the Carmen that the Orange Book prohibited the proposed transfer of work and employees, but held that as a "quasi-judicial extension of the ICC" it was authorized to abrogate provisions of the CBA and to relieve CSX of any requirement of the RLA that stood in the way of an operational change, such as a shop transfer. (Pet. App. 5a.) The majority of the arbitration panel then held that it would abrogate the Orange Book's prohibition on the transfer of work, but not on the transfer of employees outside the old Seaboard System, and also would exempt CSX from RLA requirements insofar as they might require the carrier to negotiate an agreement effecting a change in the Orange Book with respect to the work transfer. (Pet. App. 5a-6a.)

The Commission, by a divided vote, upheld the panel majority's conclusions in all but its decision not to abrogate the Orange Book prohibition on a transfer of employees. (No. 89-1028, Pet. App. 33a-52a.) The Commission affirmed the panel majority's finding that "the ICC has emphasized that a transaction hurdles all legal obstacles preventing implementation" and concluded that the panel was correct in finding that "it was empowered to override collective bargaining rights, such as those in the Orange Book, and RLA rights in formulating the implementing agreement." (No. 89-1028, Pet. App. 43a.) The Commission, however, overturned the decision of the arbitration panel to the extent that it held "that CSX may not require transfer of SCL employees as well as work from Waycross to Raceland" because imposition "of an Orange Book employee exception would effectively prevent implementation of the proposed transaction." (*Id.* 45a.)[3]

---

[3] In his dissent, Commissioner Lamboley concluded that the majority opinion "represents a continuing effort to modify Commission precedent and runs contrary to existing judicial precedent" in its "attempts to establish the proposition that *any* conflict, regardless of origin or degree, is an impediment preempted by ICA provisions." (*Id.* 49a.)

### 3. *The Court of Appeals' Decision*

Separate petitions for review of the ICC decisions in the two cases were filed with the court of appeals which considered the two cases together and remanded them to the Commission. (Pet. App. 1a-26a.) The court held that section 11341(a) of the Act does not grant the ICC its claimed power to override provisions of a CBA between a carrier and its employees. (Pet. App. 26a.) The court concluded that "the ICC's position finds no support in the language of the statute". (Pet. App. 12a.) The court also thought it unlikely "that Congress would grant the ICC a power with so much potential to destabilize the railroad industry . . . without so much as a word to that effect in the statute itself." (Pet. App. 13a.) The court reviewed the legislative history of section 11341(a) and concluded that there was no evidence whatever that the Congress "either broadened that provision so as to reach 'all legal obstacles' to an ICC-approved transaction, or acted more specifically to bring 'contracts' or 'collective bargaining agreements' within the reach of the statute." (Pet. App. 18a-19a.)

The court declined to address the issue of whether section 11341(a) might operate to override the provisions of the Railway Labor Act (Pet. App. 19a) for two reasons: first, because there has been no finding by any tribunal that such an override was "necessary" to effect the approved transaction (Pet. App. 19a-23a) and, second, because in "light of our holding that § 11341(a) does not empower the ICC to override a CBA, it is unclear what are the consequences, if any, of its rulings that the carriers need not comply with the RLA." (Pet. App. 23a-25a.)

The court declined "to address either the ICC's theory that the labor protective conditions required by § 11347 of the Act are exclusive, or its related assertion, in the *Dispatchers*' case, that § 4 of the *New York Dock* conditions give the arbitration committee the 'absolute right'



to effect the transfer of employees and to override any contrary provisions of the CBA." (Pet. App. 25a.) The court did not address those issues because "the ICC has not argued the first theory to us at all" and "its exclusivity argument before the Supreme Court [in *P&LE R. Co. v. RLEA*, 491 U.S. ——, 109 S.Ct. 2584 (1989)] would appear also to encompass both the § 11347 theory and the § 4 rationale advanced in the decisions here under review." (*Id.* 25a-26a.) The court concluded that it would not "consider as a basis for affirming the decision a ground upon which the agency places no reliance on appeal" and closed with the admonition that "in any event, we think it best for the ICC, if it has not abandoned its § 11347 and § 4 rationales altogether, to reconsider them in the first instance in light of the Supreme Court's intervening decision in *P&LE* rejecting the ICC's related position." (*Id.* 26a.) The court remanded the cases with respect to the ICC's RLA holding "in order that the agency may determine whether further proceedings are necessary." (*Id.* 26a.)[4]

Following remand, the ICC determined that further hearings were necessary "in order to permit the Commission to properly assess the role of the Commission and its labor conditions in railroad consolidations." (*CSX Corporation-Control-Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, ICC Decision, Finance Docket No. 28905 (Sub-No. 22) (August 31, 1989) [hereinafter, ICC Dec. F.D. No. 28905 (Sub-No. 22)].) The Commission stated that it was "reopening these proceedings so that

---

[4] Just over two weeks after the court of appeals issued its opinion in these cases, the ICC published its decision in *Brandywine Valley R. Co.—Purchase—Etc.*, 5 I.C.C.2d 764 (1989) in which it observed at page 772 n.5:

> In that [*Carmen*] case, the court ruled only that the exemptive provisions of 49 U.S.C. § 11341(a) did not authorize the Commission to relieve the parties to a collective bargaining agreement from their obligations under that contract (slip op. at 12-19). ***We do not dispute the validity of this limited holding by the Court.*** (Emphasis supplied.)

we may address and explain in detail our views on the issues specifically remanded; *i.e.*, whether the provisions of 49 U.S.C. 11341(a) operate to override the provisions of the Railway Labor Act (RLA) as well as on the general issues raised in these proceedings, particularly the impact of our approval of a transaction under 49 U.S.C. 11343, *et seq.* and imposition of our standard labor conditions upon the parties' rights and remedies under the RLA and with respect to existing collective bargaining agreements." (*Ibid.*) The Commission went on to seek "further comment by the parties to these proceedings as well as any other interested parties" because "of the importance of the legal issues involved and our intention to conduct a comprehensive examination of our authority under 49 U.S.C. 11341, 11343 and 11347, etc. and the labor conditions we have customarily imposed in approving railroad consolidations." (*Ibid.*) The ICC also filed a "limited" petition with the court of appeals seeking a rehearing of that court's ruling, but advised the court of its decision to reopen the proceedings and "to promptly issue a comprehensive decision on remand addressing issues we believe the court directed us to reconsider and those left open for resolution in further proceedings" and requested "that the court refrain from ruling on our petition for rehearing until we have issued our decision on remand." (*Ibid.*)

The court of appeals, on September 29, 1989, issued an order stating that the Commission's petition for rehearing would be "deferred pending release of the ICC's decision on remand". (Pet. App. 54a.) The court also amended its decision to remand only the "records", thereby retaining jurisdiction over the case. (*Id.* at 28a.) Comments were filed by all interested parties as requested by the Commission; and, following its rejection of objections of the rail unions, including ATDA and Carmen, to its order as exceeding the limits of the remand order, the ICC held oral argument on January 4, 1990. The Commission held an open voting conference on February 9, 1990, stating



that a written decision on remand would be issued in approximately one month from that date.

## ARGUMENT

Petitioners herein challenge the holding of the court of appeals that section 11341(a) does not authorize the ICC to override the provisions of a collective bargaining agreement. (No. 89-1027 Petition, 10-24; No. 89-1028 Petition, 8-19.) Union respondents ATDA and Carmen respectfully submit that the petitions for a writ of certiorari are premature and should not be granted because the court of appeals has retained jurisdiction and because of the current proceedings before the Commission. Additionally, the writs have not met the "imperative public importance" criterion set forth in Rule 11 of the Rules of this Court.

The court of appeals remanded the record to the Commission to determine whether any RLA procedures remained to be completed in light of its holding that the collective bargaining agreements could not be overridden. (Pet. App. 24a, 25a.) Upon receipt of the remand order, the Commission determined to explore what legal means it might have for superceding the employees' rights under the Railway Labor Act, if such rights would impede implementation of a consummated merger. The Commission may develop a position satisfactory to petitioners and legally acceptable to the court of appeals.

In any event, the court of appeals expressly declined to address the Commission's arguments based upon section 11347 of the Act and section 4 of the *New York Dock* conditions; nor did it decide whether section 11341(a) may exempt carriers from the requirements of the RLA. Consequently, the Commission's decision on remand may not be affected by the current decision of the court of appeals in this case. When the Commission's written decision is published, it will be presented to the court of appeals which will have an opportunity to review it and

determine whether the Commission was legally correct in its affirmance of the ATDA arbitration panel and its partial affirmance and partial reversal of the Carmen arbitration panel.

We respectfully submit that the court of appeals should be permitted to revisit these matters in a setting in which the Commission will have been able to utilize all legal theories that all interested parties could present to it. If, following a review of that decision by the court of appeals, further review by this Court is deemed warranted, the case may then present an appropriate vehicle for resolution of the disputed issues.

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM G. MAHONEY
(Counsel of Record)
JOHN O'B. CLARKE, JR.
HIGHSAW, MAHONEY
& CLARKE, P.C.
Suite 210
1050 - 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500
*Attorneys for Union Respondents*
*American Train Dispatchers*
*Association and Brotherhood*
*of Railway Carmen*

February 28, 1990

Supreme Court, U.S.
FILED
MAR 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1028

# In The
# Supreme Court of the United States
# October Term, 1989

**CSX TRANSPORTATION, INC.,**

*Petitioner,*

*v.*

**BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,**

*Respondents.*

## PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

JAMES S. WHITEHEAD
*(Counsel of Record)*
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703

NICHOLAS S. YOVANOVIC
JAMES D. TOMOLA
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

*Attorneys for Petitioner*
*CSX TRANSPORTATION, INC.*

Date: March 9, 1990

American Reprographics Management, Inc.™ (312) 332-2764

## TABLE OF CONTENTS

*Page*

ARGUMENT ..... 1

CONCLUSION ..... 6

## TABLE OF AUTHORITIES


**Cases** *Page*

*Altman* v. *Central of Ga. Ry Co.*, 488 F.2d 1302 (D.C. Cir. 1973) ..... 6

*Brandywine Valley R.R.–Purchase–CSX Transportation, Inc.*, 5 I.C.C.2d 764 (1989), *appeal docketed*, No. 89-1503 (D.C. Cir. Aug. 21, 1989) ..... 3, 4

*Brotherhood of Locomotive Engineers* v. *I.C.C.*, 885 F.2d 446 (8th Cir. 1989) ..... 4

*City of Palestine, Texas* v. *United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978) ..... 6

*CSX Corporation – Control – Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, Finance Docket No. 28905 (Sub-No. 22) (served Sept. 20, 1989) ..... 3

*Railway Labor Executives' Association* v. *I.C.C.*, 883 F.2d 1079 (D.C. Cir. 1989) ..... 4

*Schwabacher* v. *United States*, 334 U.S. 182 (1948) ..... 6

**STATUTES AND RULES**

Interstate Commerce Act, 49 U.S.C.

§ 11341(a) ..... *passim*

§ 11347 ..... 3, 5

S. Ct. Rule 10.1 (a) ..... 2

S. Ct. Rule 10.1 (c) ..... 2

S. Ct. Rule 11 ..... 2




No.

# In The
# Supreme Court of the United States
## October Term, 1989

**CSX TRANSPORTATION, INC.,**

*Petitioner,*

*v.*

**BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,**

*Respondents.*

## PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

Both the Federal Respondents and Respondent Brotherhood of Railway Carmen oppose review by this Court of the Court of Appeals' decision solely on the ground that review at this time would be premature in light of the remand pro-

ceedings currently pending before the Interstate Commerce Commission.[1]

Petitioner CSX Transportation, Inc. ("CSXT") respectfully submits that the Court should grant the petition and review now the D.C. Circuit's erroneous interpretation of a central provision of the Interstate Commerce Act for three reasons: (1) The Court of Appeals' mistaken reading of ICA § 11341(a) will neither be cured nor clarified as a result of the pending remand proceedings; (2) The erroneous interpretation has already been relied upon by other courts and, unless corrected promptly, will continue to affect future judicial decisions and private business plans in ways contrary to our national transportation policy; and (3) The possibility that, on remand and subsequent review, the ICC's authority to supersede provisions in collective bargaining agreements that would impede approved rail consolidations might be upheld as a result of provisions of the ICA other than §11341(a) will not resolve the problem created by the D.C. Circuit's erroneous interpretation of that section. As a result of the Court of Appeals' decision, ICC-approved rail consolidations found to be in the public interest can nonetheless be blocked by provisions in any private agreement.

1. There is little likelihood that the Court of Appeals' erroneous interpretation of § 11341(a) will either be cured or clarified as a result of the remand proceedings pending before

---

[1] Respondent Brotherhood of Railway Carmen also halfheartedly suggests that the petition should be denied because it does not meet the "imperative public importance" criterion set forth in S. Ct. Rule 11, governing review of a case pending in a Court of Appeals "before judgment is given in that court." Brief of Union Respondents in Opp. at 11 (Nos. 89-1027, 89-1028). The union offers no argument in support of this assertion, and Rule 11 is plainly inapplicable. The D.C. Circuit entered its judgment in this case on July 25, 1989. Pet. App. 29a.

As petitioner has demonstrated, review of the Court of Appeals' decision is amply warranted under the standards set forth in S. Ct. Rule 10.1 (a) and (c) because that decision's interpretation of ICA § 11341(a) conflicts with decisions of both this Court and other Courts of Appeals and is manifestly contrary to the Act's terms and legislative history. The Court of Appeals' erroneous interpretation of this central provision of the ICA threatens to undermine the achievement of the national transportation policy of fostering and encouraging railroad consolidations found by the ICC to be in the public interest.



the ICC or on subsequent review in the D.C. Circuit. The Court of Appeals instructed the Commission on remand to consider only two specific issues: (1) whether the immunity conferred in ICA § 11341(a) from "all other law" includes immunity from the Railway Labor Act, and (2) whether the Commission and its arbitrators have the authority to supersede provisions of collective bargaining agreements that would impede a transaction as a result of the labor protection provisions of the ICA, found in § 11347, and the terms of the Commission's standard labor protection conditions. Pet. App. 25a-26a. The D.C. Circuit did not authorize the Commission to consider or address on remand the court's holding that the scope of § 11341(a)'s immunity does not extend to include private contracts, such as collective bargaining agreements.

The Commission, in requesting comments from the parties and other interested persons on remand, has adhered to the Court of Appeals' mandate.[2] The Commission has indicated that it intends to address: (1) whether § 11341(a) operates to override the Railway Labor Act and (2) the impact of Commission approval of a transaction subject to labor protection obligations under § 11347 and the Commission's standard labor conditions upon the rights and remedies of parties under the Railway Labor Act and existing collective bargaining agreements.[3] At the public voting conference held on February 9, 1990, the Commissioners similarly indicated their understanding that they were bound by the Court of Appeals' interpretation of § 11341(a) in these proceedings.[4] Accordingly, neither the Commission's decision on

---

[2] Indeed, the Commission has announced that it has acquiesced in the court's interpretation of § 11341(a) until such interpretation is reversed by this Court or reconsidered by the Court of Appeals. *Brandywine Valley R.R. —Purchase—CSX Transportation, Inc.*, 5 I.C.C.2d 764, 772 n.5 (1989), *appeal docketed*, No. 89-1503 (D.C. Cir. Aug. 21, 1989).

[3] *CSX Corporation — Control — Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, Finance Docket No. 28905 (Sub-No. 22) (served Sept. 20, 1989), at 1.

[4] Transcript of Voting Conference in *CSX Corporation — Control — Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, Finance Docket No. 28905 (Sub-No. 22) (Feb. 9, 1990), at 48-49.

remand nor the Court of Appeals' review of any such decision is likely to shed any additional light on the issue of the proper interpretation of the scope of § 11341(a) as it relates to contractual obligations.[5] While the Federal Respondents have informed this Court that the Commission "expects to create a fuller record on which to defend its decision if, and when, the case returns to the court of appeals" (Brief of Federal Respondents in Opp. at 11), such "fuller record" will not deal with the legal issue presented in the instant petition.

As a result, the Court of Appeals' erroneous interpretation of ICA § 11341(a) is ripe for review at this time and is unlikely to be affected by the remand proceedings in the ICC or subsequent D.C. Circuit review.

2. Any delay in reviewing the Court of Appeals' decision will continue to allow that court's mistaken construction of § 11341(a) to infect other judicial and regulatory proceedings. Already, two appellate panels have approvingly cited the D.C. Circuit's holding, without engaging in any independent analysis of the language or history of that section. *Railway Labor Executives' Ass'n* v. *I.C.C.*, 883 F.2d 1079 (D.C. Cir. 1989); *Brotherhood of Locomotive Engineers* v. *I.C.C.*, 885 F.2d 446 (8th Cir. 1989). As noted above, the ICC has also acquiesced in the D.C. Circuit's holding in administrative proceedings pending before it without any independent statutory analysis. *Brandywine Valley R.R. Co.*

The Court of Appeals' decision, until reviewed and reversed, also jeopardizes any plans of railroads to implement restructuring transactions such as mergers and consolidations to which § 11341(a)'s immunity provisions apply. Rail carriers know that, in light of the D.C. Circuit's ruling, they will inevitably be faced with claims by rail unions that the proposed transaction can be implemented only after the interminable bargaining procedures of the Railway Labor Act have been fully exhausted because the transaction allegedly conflicts with the seniority clauses, scope provisions, or other terms in existing collective bargaining agreements. As a result, transactions that would further the public interest and the achievement of the national transportation policy may be delayed and additional litigation may be generated until this Court corrects the D.C. Circuit's erroneous interpretation of ICA § 11341(a).

[5] There would appear to be little chance that the D.C. Circuit will reconsider and correct its interpretation of § 11341(a) when it reviews the Commission's decision on remand in view of the fact that petitions for rehearing and suggestions for rehearing *en banc*, filed by CSXT and Norfolk and Western Railway Company and Southern Railway Company (petitioners in No. 89-1027) following the Court of Appeals' decision, were denied. Pet. App. 30a, 31a.



3. The Federal Respondents argue against review of the D.C. Circuit's decision at this time because of the possibility that the Commission on remand may adopt an alternative basis to ICA § 11341(a) for allowing approved consolidations to go forward without exhaustion of the Railway Labor Act bargaining procedures; "[i]t is entirely possible that the Commission may adopt a position on one or more of these alternatives that may obviate the difficulties entailed by the court of appeals' decision. . . ." Brief for the Federal Respondents in Opp. at 11. Such an alternative would be based on the ICA's special labor protection provisions, found in § 11347, and on the Commission's standard labor protection conditions.

The possibility that the D.C. Circuit's erroneous interpretation of § 11341(a) may not ultimately prevent carriers from implementing consolidations found to be in the public interest, notwithstanding restraints emanating from collective bargaining agreements, does not reduce the importance of this Court's review of the Court of Appeals' July 25, 1989, decision. The D.C. Circuit did not merely hold that Congress intended collective bargaining agreements to be outside of the immunity provisions of § 11341(a); its holding was far broader and could be construed to encompass all manner of contractual relationships:

> Nowhere does [§ 11341(a)] say that the ICC may also override contracts, nor has it ever, in any of the various iterations since its initial enactment in 1920, included even a general reference to "contracts," much less any specific reference to CBAs.

Pet. App. 12a.

As a result of the D.C. Circuit's decision, rail carrier consolidations — and the public interest — are potentially hostage to a host of private contractual restrictions, including the type of contractual charter provisions superseded in *Schwabacher* v. *United States*, 334 U.S. 182 (1948). *See also City of Palestine, Texas* v. *United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978) (consolidating carrier required to comply with agreement to maintain 4.5% of its employees in Palestine, Texas, because relief from such agreement not "necessary" to consolidation); *Altman* v. *Central of Ga. Ry Co.*, 488 F.2d 1302 (D.C. Cir. 1973) (ICC consolidation approval supersedes charter provisions governing payment of dividends). This Court should review the Court of Appeals' decision now in order to resolve this fundamental issue of the scope of the authority conferred on consolidating carriers under the ICA.

## CONCLUSION

For the reasons set forth herein and in CSX Transportation's petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

JAMES S. WHITEHEAD
*(Counsel of Record)*
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703

NICHOLAS S. YOVANOVIC
JAMES D. TOMOLA
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

*Attorneys for Petitioner*
*CSX TRANSPORTATION, INC.*

Date: March 9, 1990

Nos. 89-1027 & 89-1028

Supreme Court, U.S.
FILED
JAN 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

---

NORFOLK & WESTERN RAILWAY COMPANY and
SOUTHERN RAILWAY COMPANY,
*Petitioners,*

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
*Respondents.*

---

CSX TRANSPORTATION, INC.,
*Petitioner,*

v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
*Respondents.*

---

**On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS

---

DAVID P. LEE
Vice Chairman &
General Counsel
NATIONAL RAILWAY LABOR
CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-2700

RICHARD T. CONWAY
RALPH J. MOORE, JR.
(Counsel of Record)
D. EUGENIA LANGAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
*Attorneys for the National Railway Labor Conference*

Date: January 29, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| STATEMENT OF THE CASE | 2 |
| INTEREST OF *AMICUS CURIAE* | 5 |
| SUMMARY OF ARGUMENT | 6 |
| ARGUMENT | 7 |
| The Decision Below Threatens to Bring an Immediate Halt to the Implementation of Railroad Mergers and Consolidations that Congress Has Determined Are in the Public Interest and Should be Encouraged, and Therefore Immediate Review by this Court is Warranted | 7 |

## TABLE OF AUTHORITIES


*Cases:* Page

*Brotherhood of Loc. Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986) ..... 10

*Brotherhood of Loc. Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963) ..... 10

*Brotherhood of Loc. Engineers* v. *ICC*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd*, 482 U.S. 270 (1987) ..... 8

*Burlington Northern* v. *Maintenance Employes*, 481 U.S. 429 (1987) ..... 4

*County of Marin* v. *United States*, 356 U.S. 412 (1958) ..... 8

*Elgin J. & E. R. Co.* v. *Burley*, 325 F.2d 711 (1945) ..... 4

*FRVR Corp. et al.*, ICC Finance Docket No. 31205 (served Jan. 29, 1988), *aff'd as clarified on other grounds sub nom. Railroad Labor Exec. Ass'n* v. *ICC*, 861 F.2d 1082 (8th Cir. 1988), *vacated and remanded*, 109 S. Ct. 3209 (1989), *rev'd on other grounds*, 888 F.2d 1227 (8th Cir. 1989) ..... 11

*ICC* v. *Locomotive Engineers*, 482 U.S. 270 (1987) ..... 7, 10

*Maintenance Employes* v. *United States*, 366 U.S. 169 (1961) ..... 8

*Missouri Pac. R.R.* v. *United Transp. Union*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987) ..... 9, 10

*Nemitz* v. *Norfolk & W. Ry.*, 436 F.2d 841 (6th Cir.), *aff'd*, 404 U.S. 37 (1971) ..... 10

*New York Dock Ry.—Control—Brooklyn E.D. Terminal*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979) ..... 3

*Pittsburgh & Lake Erie R.R.* v. *Railway Labor Exec. Ass'n*, 109 S. Ct. 2584 (1989) ..... 11

*Railway Clerks* v. *Florida E.C. R. Co.*, 384 U.S. 238 (1966) ..... 4




## TABLE OF AUTHORITIES—Continued


Page

*Railway Labor Exec. Ass'n* v. *Guilford Transp. Indus., Inc.*, 667 F. Supp. 29 (D. Me. 1987), *aff'd*, 843 F.2d 1383 (1st Cir.) (Table), *cert. denied*, 109 S. Ct. 3213 (1989) ..... 10

*Railway Labor Exec. Ass'n* v. *ICC*, 784 F.2d 959 (9th Cir. 1986) ..... 9

*Railway Labor Exec. Ass'n* v. *Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3d Cir. 1987), *rev'd*, 109 S. Ct. 2584 (1989) ..... 11

*Railway Labor Exec. Ass'n* v. *Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3d Cir. 1988), *rev'd*, 109 S. Ct. 2584 (1989) ..... 11

*Shore Line* v. *Transportation Union*, 396 U.S. 142 (1969) ..... 4

*United States* v. *Lowden*, 308 U.S. 225 (1939) ..... 7, 8

*Statutes:*

Revised Interstate Commerce Act, Subtitle IV, 49 U.S.C.:

§ 10101a, 49 U.S.C. § 10101a ..... 7

§ 10901, 49 U.S.C. § 10901 ..... 10, 11

§ 11341(a), 49 U.S.C. § 11341(a) ..... *passim*

§ 11343, 49 U.S.C. § 11343 ..... 2, 3, 8

§ 11344, 49 U.S.C. § 11344 ..... 2

§ 11347, 49 U.S.C. § 11347 ..... 2, 3

Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, 90 Stat. 31 (1976) ..... 8

Section 101(a)(2), 45 U.S.C. § 801(a)(2) ..... 9

Transportation Act of 1920, ch. 91, § 407(8), 41 Stat. 456, 482 (1920) ..... 2-3

Transportation Act of 1940, ch. 722, 54 Stat. 899 (1940):

§ 7(2), 54 Stat. 905 ..... 8

§ 7(11), 54 Stat. 908-09 ..... 2

Public Law 95-573, 92 Stat. 1337 (1978) ..... 2

§ 3(a), 92 Stat. 1466 ..... 3

Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ..... 3, 4, 9, 10, 11

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Legislative Materials:* | |
| S. Rep. No. 94-499, 94th Cong. 1st Sess. (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 14 | 9 |
| *Supreme Court Rules:* | |
| Rule 37.2 | 1 |
| Rule 11 | 8 |


IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

---

Nos. 89-1027 & 89-1028

---

NORFOLK & WESTERN RAILWAY COMPANY and SOUTHERN RAILWAY COMPANY,
*Petitioners,*

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
*Respondents.*

---

CSX TRANSPORTATION, INC.,
*Petitioner,*

v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
*Respondents.*

---

**On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS

---

This *amicus* brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 37.2. The National Railway Labor Conference ("NRLC") urges the Court to grant the petitions for writs of certiorari in these two cases, which seek review of the same decision of the District of Columbia Circuit.

## STATEMENT OF THE CASE

Under § 11343 of the Interstate Commerce Act ("ICA"), railroad mergers and consolidations and other similar transactions "may be carried out only with the approval and authorization of the" Interstate Commerce Commission ("ICC").[1] Under ICA § 11344, when considering a proposed merger or consolidation, the ICC must balance a number of factors, including "the interest of carrier employees affected by the proposed transaction," and "shall approve and authorize" the transaction "when it finds the transaction is consistent with the public interest." The ICC is then required under ICA § 11347 to impose labor protective conditions to compensate employees for adverse effects resulting from the transaction.

Section 11341(a) of the ICA provides that the ICC's authority under §§ 11343-11347 is "exclusive," and that "a carrier, corporation, or person participating in" a transaction approved under those provisions "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction * * *."[2]

---

[1] The ICA was codified in 1978 as Subtitle IV of 49 U.S.C. Public Law 95-573, 92 Stat. 1337. Citation herein to a current section of the Act is to that section of 49 U.S.C.

[2] Current § 11341(a) derives from former § 5(11) of the ICA, which was enacted in 1940 to provide that the Commission's authority over mergers and consolidations "shall be exclusive and plenary," and that carriers participating in such approved transactions "shall be and they hereby are relieved from the operation of the antitrust laws and of *all other restraints, limitations, and prohibitions of law, Federal, State, or municipal,* insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission * * *." Transportation Act of 1940, ch. 722, § 7(11), 54 Stat. 899, 905 (1940) (emphasis added). Similar provisions have appeared in the ICA since 1920. See Transportation Act of 1920, ch. 91, § 407(8), 41 Stat. 456, 482 (1920). Section 5(11) was recodified "without substantive change" as § 11341(a) in 1978. Public Law 95-473 § 3(a), 92 Stat. 1466.



The question presented by the petitions in these cases is whether the exemption from "all other law" in § 11341(a) applies to provisions of collective bargaining agreements, otherwise enforceable under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, that if enforced would prevent a carrier from "carrying out" an approved merger or consolidation.

In each of the two instant cases, the petitioners, pursuant to merger authority granted by the ICC, proposed to consolidate certain operating functions on the merged railroad systems, which would require the transfer of some work and employees. Affected employees would, however, be entitled to make-whole compensatory benefits under the ICC's standard *New York Dock* Labor protective conditions required under ICA § 11347 for all transactions undertaken pursuant to merger authority under ICA § 11343.[3]

Under the *New York Dock* conditions, an "implementing agreement" providing the terms for any rearrangement of work-forces must be in place before a transaction can be consummated; binding arbitration is required on any such implementing issues that remain unresolved through negotiations after 90 days' notice of the proposed transaction is given to unions representing affected employees.[4] In these cases, the respondent unions argued in the implementing arbitration proceedings that their collective bargaining agreements would not permit (and in No. 89-1028, actually prohibited) the transfers of work and employees on the terms proposed by the car-

---

[3] See *New York Dock Ry.—Control—Brooklyn E.D. Terminal,* 360 I.C.C. 60, 84-90 (1979), *aff'd sub nom. New York Dock Ry.* v. *United States,* 609 F.2d 83 (2d Cir. 1979).

[4] *New York Dock, supra,* 360 I.C.C. at 85.

riers, and that the consolidations must therefore be delayed until the carriers exhausted the RLA "major dispute" procedures for negotiating changes to collective bargaining agreements. Those procedures, as this Court has noted, are notoriously "long and drawn out" and "almost interminable."[5] If these RLA procedures are exhausted without yielding agreement, arbitration is available, but cannot be compelled,[6] and when unions refuse arbitration they are free to resort to strikes and nationwide secondary picketing to block changes proposed by carriers.[7]

The arbitrator in each of these cases rejected the unions' arguments that their collective bargaining rights under the RLA could be enforced to prohibit the proposed transactions. The unions appealed the arbitration awards to the ICC, which also held in each case that § 11341(a) relieved the carriers of the obligations the unions had asserted under the RLA and their collective bargaining agreements since these obligations would otherwise defeat the proposed transactions. (No. 89-1027 App. 33a-35a, 37a; No. 89-1028 App. 44a).

The unions sought review of the ICC's decisions in the District of Columbia Circuit, which "dispose[d] of the two cases together because they raise[d] common issues with respect to the ICC's authority [under ICA § 11341(a)] to exempt a party to a merger between two railway carriers" from "the provisions of (1) a Collective Bargaining Agreement (CBA); and (2) the Railway Labor Act * * *." (No. 89-1027 App. 2a). The court of appeals held that the exemption under § 11341(a)

[5] *Railway Clerks* v. *Florida E.C. R. Co.*, 384 U.S. 238, 246, 244 (1966); *Shore Line* v. *Transportation Union*, 396 U.S. 142, 149 (1969).

[6] See *Elgin J. & E. R. Co.* v. *Burley*, 325 F.2d 711, 725 (1945).

[7] See *Burlington Northern* v. *Maintenance Employes*, 481 U.S. 429, 450-53 (1987).



from "all other law * * * as necessary * * * to carry out" an approved merger or consolidation, does not apply to RLA collective bargaining agreements, because, in the court's view, the exemption should confer immunity only from "positive enactments, not common law rules of liability, as on a contract." (*Id.* at 18a). In light of that holding, the court of appeals deemed it unnecessary to decide whether the § 11341(a) exemption applies to the RLA itself, and remanded that issue, among others, to the ICC. (*Id.* at 25a).

The ICC, in a document styled "Petition for Rehearing," advised the court of appeals that it would conduct proceedings on the remanded issues, and asked the court to hold the "Petition" pending the outcome of those proceedings. The court of appeals has deferred consideration of the ICC's petition until the decision on remand is issued, and the original panel has amended its judgment to retain jurisdiction of the cases. (No. 89-1027 Pet. App. 54a, 27a-28a).

## INTEREST OF *AMICUS CURIAE*

The NRLC is an unincorporated association which includes most of the nation's major railroads among its members. The NRLC represents its members in multi-employer collective bargaining under the RLA and with respect to other labor relations issues of general concern to the railroad industry that may arise before federal and state courts, legislatures, and administrative agencies.

The question presented in these cases is of paramount importance to the railroad industry. The ability of carriers to rationalize their operations through mergers and consolidations is critical to the maintenance of a viable national railroad transportation system. The decision below creates substantial doubt as to whether carriers will have that ability any longer, for the holding that § 11341(a) does not exempt carriers from obligations under collective bargaining agreements paves the way for

rail labor to interpose its asserted private interests under agreements as impediments or even absolute bars to the implementation of mergers and consolidations authorized by the ICC under the ICA's public interest standard. That doubt will exist even where no express merger-barring provision is included in a collective bargaining agreement (as in the case in No. 89-1027), because the unions have asserted in the proceedings before the ICC in this matter that transfer of work and employees in mergers and consolidations is effectively barred by seniority rules and other general rules that, in the NRLC's experience, are included in virtually *every* work-rule agreement in the railroad industry. Unless the decision below is reversed promptly, many carriers will be deterred from undertaking mergers and consolidations, or from further implementing those already approved by the Commission and underway. Accordingly, the NRLC and its member railroads have a vital interest in prompt resolution by this Court of the uncertainty created by the decision below as to the railroads' right to implement mergers and consolidations on the terms approved by the ICC.

## SUMMARY OF ARGUMENT

The petitions for certiorari demonstrate that the decision of the District of Columbia Circuit is in conflict with decisions of this Court and of other circuits and is flatly contrary to the plain language of § 11341(a) and its legislative history. The NRLC will not repeat that showing here, but will address itself to the reason why this Court should grant review of the question presented in these cases *now*, notwithstanding the pendency of further proceedings on other questions before the ICC and the court of appeals. Simply put, the question presented by the decision below is of such imperative public importance that immediate review by this Court is war-



ranted.[8] Congress has determined and repeatedly stated that railroad consolidations and mergers are generally in the public interest. Congress has vested the ICC with exclusive jurisdiction to determine whether individual mergers and consolidations comport with the public interest standard and to establish the conditions upon which such transactions may go forward. Under the decision below, the private interests of rail labor under RLA collective bargaining agreements may trump both the general public interest determination of the Congress and the individual public interest determinations of the ICC by blocking approved mergers and consolidations. The resulting uncertainty as to the ability of carriers to implement mergers and consolidations approved by the ICC threatens to call an immediate halt to such transactions, contrary to the public interest and the express intent of Congress. Immediate review by this Court is necessary to remove that injurious uncertainty.

## ARGUMENT

### The Decision Below Threatens to Bring an Immediate Halt to The Implementation of Railroad Mergers and Consolidations that Congress Has Determined Are in the Public Interest and Should be Encouraged, and Therefore Immediate Review by this Court is Warranted.

The cardinal purpose of the ICA, as this Court has observed, is "the maintenance of an adequate rail transportation system." *United States* v. *Lowden*, 308 U.S. 225, 230 (1939). That purpose is today expressed in ICA § 10101a, which establishes the "policy of the United States" with respect to the railroad industry. See § 10101a(3), (4), (5). And for over 60 years, Congress has sought to effectuate that purpose by encouraging rail-

---

[8] Indeed, this Court granted certiorari on a similar question, in very similar circumstances, in *ICC* v. *Locomotive Engineers*, 482 U.S. 270 (1987). In that case the District of Columbia Circuit had vacated ICC orders which relied on § 11341(a) to reject a union's

road mergers and consolidations. As this Court explained in *Lowden*, *supra*, "[a]s a result of the Transportation Act in 1920," the progenitor of the modern ICA, "consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy • • • so intimately related to the maintenance of an adequate and efficient rail transportation system that the 'public interest' in the one cannot be dissociated from that in the other." 308 U.S. at 232.

Congress has repeatedly reaffirmed that "established national policy." The Transportation Act of 1920, which left mergers and consolidations largely to the Commission's initiative (see 308 U.S. at 232), proved insufficient to its end. In the Transportation Act of 1940, therefore, Congress amended the ICA to add the predecessor of current § 11343, giving rail carriers principal authority to initiate mergers and consolidations. § 7(2), 54 Stat. 905. The chief goal of this amendment "'was to facilitate merger and consolidation in the national transportation system.'"[9]

Congress last revisited this issue in the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), Pub. L. 94-210, 90 Stat. 31, which continued the

---

claim that its collective bargaining agreement and the RLA barred implementation of a § 11343 transaction as approved by the Commission; the court held that the ICC was required to make explicit findings as to the necessity for the § 11341(a) exemption and remanded the case back to the ICC for further proceedings. *Brotherhood of Loc. Engineers* v. *ICC*, 761 F.2d 714, 716 (D.C. Cir. 1985), *rev'd on other grounds*, 482 U.S. 270 (1987). This Court granted certiorari "on the question of the proper construction of § 11341(a)" despite the remand order (although the Court ultimately concluded on other procedural grounds that the question was not properly presented in that case). 482 U.S. at 277, 284, 286-87. *Cf.* Supreme Court Rule 11, authorizing writs of certiorari before judgment.

[9] *Maintenance Employes* v. *United States*, 366 U.S. 169, 173 (1961), *quoting County of Marin* v. *United States*, 356 U.S. 412, 416 (1958).



national pro-merger policy. The 4-R Act "was an attempt to restructure the railroad industry in the face of chronic financial losses and line closures."[10] It sought to promote an efficient rail transportation system through (among other things) "the encouragement of efforts to restructure the system on a more economically justified basis" by providing "an expedited procedure for determining whether merger and consolidation applications are in the public interest • • •." 4-R Act § 101(a)(2), 90 Stat. 33, codified at 45 U.S.C § 801(a)(2). Once again, Congress avowedly "intended to encourage mergers, consolidations and joint use of facilities that tend to rationalize and improve the Nation's rail system • • •."[11]

The decision below strikes an immediate and potentially crippling blow to this important national policy. If RLA collective bargaining agreements can be enforced to prohibit the implementation of approved mergers and consolidations, notwithstanding the express exemption in ICA § 11341(a) from all obligations under "other law" that might otherwise have such merger-barring effect, and if, as the unions contend, those agreements cannot be altered except through the RLA major dispute provisions, then rail labor will have "carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC" or to "block consolidations which are in the public interest," as the United States Court of Appeals for the Eighth Circuit has recognized.[12] The federal courts have long agreed that subjecting the implementation of an approved merger or consolidation to the RLA major dispute procedures, with

---

[10] *Railway Labor Exec. Ass'n* v. *ICC*, 784 F.2d 959, 965 (9th Cir. 1986).

[11] S. Rep. No. 94-499, 94th Cong. 1st Sess. 20-21 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 14, 34.

[12] *Missouri Pac. R.R.* v. *United Transp. Union*, 782 F.2d 107, 112 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987).

their attendant delays and ultimate threat of strikes, would "threaten to prevent many consolidations" and mergers, because "under the Railway Labor Act [major dispute] provisions it is possible for either party to completely block any change in working conditions by refusing to agree to a change and refusing to arbitrate." [13]

Until the decision below, the courts have likewise agreed that it is "inconceivable" that Congress could have intended to grant rail labor such a "veto" power over transactions Congress and the ICC have determined are in the public interest.[14] The decision below nonchalantly accepts the possibility that such a labor veto exists, opining, for example, that the carriers in No. 89-1027 might as well decide to cancel the disputed consolidation in that case, regardless of the outcome of the issues remanded to the ICC, in view of the court's holding that ICA § 11341(a) could not be applied to "set aside" any agreement that "would have prevented the consolidation from going forward * * *." (No. 89-1027 App. 25a).

While the possibility of such a labor veto over mergers and consolidations exists, few, if any, of these transactions are likely to go forward. That can be seen from the history of the litigation over the application of RLA major dispute procedures to line sales to new regional railroads under ICA § 10901, which culminated in this

[13] *Brotherhood of Loc. Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d 424, 431 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963); accord *Nemitz* v. *Norfolk & W. Ry.*, 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971).

[14] *Missouri Pacific*, *supra*, 782 F.2d at 112; see also, *e.g.*, *Brotherhood of Loc. Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794, 799-801 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986); *Nemitz*, *supra*, 436 F.2d at 845; *Chicago & N.W. Ry.*, *supra*, 314 F.2d at 432; *Railway Labor Exec. Ass'n* v. *Guilford Transp. Indus., Inc.*, 667 F. Supp. 29, 34-35 (D. Me. 1987), *aff'd*, 843 F.2d 1383 (1st Cir.) (Table), *cert. denied*, 109 S. Ct. 3213 (1989). See also *ICC* v. *Locomotive Engineers*, 482 U.S. 270, 296-99 (1987) (Stevens, J., concurring).



Court's decision last Term in *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Exec. Ass'n*, 109 S. Ct. 2584 (1989). Prior to 1987, the federal courts had repeatedly and consistently rejected rail labor's efforts to veto these transactions under the RLA. In 1987, however, the United States Court of Appeals for the Third Circuit held that unions have the right to strike to prevent such sales,[15] and followed up in 1988 with a decision holding that such sales may be delayed pending exhaustion of the RLA major dispute procedures.[16] The resulting uncertainty about the right of carriers to sell lines under § 10901 without the unions' consent had "an immediate" chilling "impact on the formation of small railroads, threatening to halt the revitalization of marginal railroad sectors—a restructuring that the Commission ha[d] found to be in the interest of carriers, labor, and the shipping public." [17] This Court granted certiorari to resolve the uncertainty that the Third Circuit's rulings had created, and ultimately rejected the veto power rail labor claimed over § 10901 sales. 109 S. Ct. at 2597.

The need for immediate review by this Court is even more acute in these cases than it was in the *Pittsburgh & Lake Erie* cases. The decision below threatens a similar immediate chilling effect on mergers and consolidations, transactions that the Congress itself has repeatedly and unequivocally found to be in the public interest and vital to the national rail transportation policy. Only a

[15] *Railway Labor Exec. Ass'n* v. *Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3d Cir. 1987), *rev'd on other grounds*, 109 S. Ct. 2584 (1989).

[16] *Railway Labor Exec. Ass'n* v. *Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3d Cir. 1988), *rev'd*, 109 S. Ct. 2584 (1989).

[17] *FRVR Corp. et al.*, ICC Finance Docket No. 31205, p. 8 (served Jan. 29, 1988), *aff'd as clarified on other grounds sub nom. Railroad Labor Exec. Ass'n* v. *ICC*, 861 F.2d 1082 (8th Cir. 1988), *vacated and remanded*, 109 S. Ct. 3209 (1989), *rev'd on other grounds*, 888 F.2d 1227 (8th Cir. 1989).

definitive ruling by this Court on the question presented can ensure that the decision below will not allow rail labor to frustrate this important federal policy.

## CONCLUSION

For the foregoing reasons, as well as those set forth in the petitions for certiorari, the Court should grant writs of certiorari to review the decision of the District of Columbia Circuit.

Respectfully submitted,

DAVID P. LEE
Vice Chairman &
General Counsel
NATIONAL RAILWAY LABOR
CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-2700

RICHARD T. CONWAY
RALPH J. MOORE, JR.
(Counsel of Record)
D. EUGENIA LANGAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
*Attorneys for the National Railway Labor Conference*

Date: January 29, 1980

Supreme Court, U.S.
FILED
FEB 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 89-1027 and 89-1028

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

NORFOLK AND WESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY, *Petitioners*,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, *Respondents*.

CSX TRANSPORTATION, INC., *Petitioner*,

v.

BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA, *Respondents*.

**On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF *AMICUS CURIAE* OF CONSOLIDATED RAIL CORPORATION IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

BRUCE B. WILSON
CONSTANCE L. ABRAMS
JOHN B. ROSSI, JR.
CONSOLIDATED RAIL CORPORATION
1138 Six Penn Center Plaza
Philadelphia, PA 19103
Telephone: (215) 977-4041

A. RAYMOND RANDOLPH
*Counsel of Record*
PAUL A. CUNNINGHAM
DENNIS A. AROUCA
JAMES A. MEYERS
PEPPER, HAMILTON & SCHEETZ
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
Telephone: (202) 828-1200
*Attorneys for Consolidated Rail Corporation*

Dated: February 28, 1990

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| INTEREST OF *AMICUS CURIAE* | 1 |
| ARGUMENT | 2 |
| CONCLUSION | 15 |

## TABLE OF AUTHORITIES


CASES:

| | Page |
|---|---|
| *Andrews* v. *Louisville & Nashville R.R.*, 406 U.S. 320 (1972) | 4 |
| *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986) | 5, 12 |
| *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963) | 12 |
| *Brotherhood of Locomotive Engineers* v. *ICC*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd*, 482 U.S. 270 (1987) | 5 |
| *Brotherhood of Ry. & Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238 (1966) | 13 |
| *Burlington Northern, Inc.* v. *American Ry. Supervisors Ass'n*, 503 F.2d 58 (7th Cir. 1974) (per curiam), *cert. denied*, 421 U.S. 975 (1975) | 12 |
| *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984) | 3, 5, 6 |
| *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) | 4 |
| *Connolly* v. *PBGC*, 475 U.S. 211 (1986) | 4 |
| *County of Marin* v. *United States*, 356 U.S. 412 (1958) | 9 |
| *Detroit & Toledo Shore Line R.R.* v. *United Transp. Union*, 396 U.S. 142 (1969) | 4 |
| *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938) | 4 |
| *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) | 11 |
| *Missouri Pac. R.R.* v. *United Transp. Union*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987) | 12 |
| *Munn* v. *Illinois*, 94 U.S. 113 (1877) | 4 |
| *Nemitz* v. *Norfolk & Western Ry.*, 436 F.2d 841 (6th Cir.), *aff'd*, 404 U.S. 37 (1971) | 12 |
| *Norman* v. *Baltimore & O. R.R.*, 294 U.S. 240 (1935) | 4 |
| *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2584 (1989) | 9, 10 |
| *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959) | 4 |
| *Schwabacher* v. *United States*, 334 U.S. 182 (1948) | 2, 9, 10, 11 |
| *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) | 4 |




## Table of Authorities Continued


| | Page |
|---|---|
| *Texas* v. *United States*, 292 U.S. 522 (1934) | 7 |
| *United States* v. *Lowden*, 308 U.S. 225 (1939) | 10 |

STATUTES AND RULES:

| | |
|---|---|
| Interstate Commerce Act, | |
| Former § 5(11), 49 U.S.C. § 5(11) | 3 |
| § 11341, 49 U.S.C. § 11341 | *passim* |
| § 11343, 49 U.S.C. § 11343 | 2, 7 |
| § 11344, 49 U.S.C. § 11344 | 7, 10 |
| § 11347, 49 U.S.C. § 11347 | 10 |
| Railway Labor Act, § 2, 45 U.S.C. § 152 | 4 |
| Rules of Decision Act, 28 U.S.C. § 1652 | 4 |
| Supreme Court Rule 37.2 | 2 |

LEGISLATIVE ENACTMENTS:

| | |
|---|---|
| Act of Oct. 13, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1377 | 3 |
| Emergency Railroad Transportation Act, 1933, ch. 91, 48 Stat. 211 | 7 |
| Transportation Act, 1920, ch. 91, 41 Stat. 456 | 7 |

LEGISLATIVE HISTORY:

| | |
|---|---|
| H.R. Rep. No. 95-1395, 95th Cong., 2d Sess. 158 (1978) | 3 |
| S. Rep. No. 1182, 76th Cong., 3d Sess. Pt. 1, 1 (1940) | 9 |

AGENCY PROCEEDINGS:

| | |
|---|---|
| *Brandywine Valley R.R.—Purchase—CSX Transp., Inc.*, 5 I.C.C.2d 764 (1989) | 8 |
| *Denver & Rio Grande Western R.R.—Trackage Rights—Missouri Pac. R.R.*, Finance Docket No. 30,000 (Sub-No. 18) (decision served Oct. 25, 1983), *vacated sub nom. Brotherhood of Locomotive Engineers* v. *ICC*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd*, 482 U.S. 270 (1987) | 5 |
| *Gulf, Mobile & Ohio R.R.—Abandonment*, 282 I.C.C. 311 (1952) | 8 |
| *Maine Central R.R.—Exemption from 49 U.S.C. 11342 and 11343*, Finance Docket No. 30,532 (decision served Sept. 16, 1985), *aff'd mem. sub nom. Railway Labor Executives' Ass'n* v. *ICC*, 812 F.2d 1443 (D.C. Cir. 1987) | 5 |

**Table of Authorities Continued**


| | Page |
|---|---|
| Transcript of Voting Conference, *CSX Corp.—Control—Chessie System, Inc.*, Finance Docket No. 28,905 (Sub-No. 22) (Feb. 9, 1990) | 14 |
| MISCELLANEOUS: | |
| Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511 (1989) | 8 |


IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

**Nos. 89-1027 and 89-1028**

NORFOLK AND WESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY, *Petitioners*,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, *Respondents*.

CSX TRANSPORTATION, INC., *Petitioner*,

v.

BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA, *Respondents*.

**On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF *AMICUS CURIAE* OF CONSOLIDATED RAIL CORPORATION IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

### INTEREST OF *AMICUS CURIAE*

Consolidated Rail Corporation ("Conrail") is a rail carrier headquartered in Philadelphia, Pennsylvania. It primarily offers freight service in the northeast and midwest corridors over more than 28,000 miles of track. Conrail's 1988 year-end operating revenues exceeded $3.4

billion and its total assets as of the end of 1988 exceeded $7 billion.[1]

After nearly 20 years of efforts to restructure the northeast and midwest rail systems, Conrail has emerged as a publicly owned, self-sustaining corporation. Like all rail carriers, Conrail faces the constant challenge of remaining competitive in an increasingly deregulated transportation market. This challenge may require Conrail to enter into "control" transactions[2] that must be approved by the Interstate Commerce Commission ("Commission" or "ICC"). The court of appeals decided that the Commission's approval of a control transaction does not permit participating rail carriers to implement the approved transaction when it conflicts with the requirements of private contracts (including, for example, collective bargaining agreements). That decision is therefore of great significance to Conrail and threatens to have an immediate and deleterious impact upon its corporate planning and the efficiency of its operations.

## ARGUMENT

The decision below is wrong. It conflicts with the decision of this Court in *Schwabacher* v. *United States*, 334 U.S. 182 (1948), and with the decisions of every other court of appeals that has considered the issue. The court of appeals rejected the Commission's interpretation of the statute it administers and did so on a basis that disregarded the standards of *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

[1] This brief is filed pursuant to Rule 37.2 of the Rules of this Court, accompanied by the written consent of all parties.

[2] Control transactions include mergers, consolidations, purchases, leases, contracts to operate property of another carrier, acquisitions of trackage rights and other acquisitions of control. 49 U.S.C. § 11343(a).



The decision below has enormous consequences for Conrail and other rail carriers and disregards the protection for railroad employees Congress deemed appropriate. Contrary to the assertion of the federal respondents, proceedings on remand will not obviate the need for review of the question presented. Delaying such review would cause significant disruption in corporate planning decisions and create uncertainty that will adversely affect the public interest. For these reasons, which we discuss below, review now is warranted.

1. The court of appeals held that Section 11341(a) of the Interstate Commerce Act ("ICA"), 49 U.S.C. § 11341(a), does not permit carriers participating in an ICC-approved control transaction to implement the transaction when it conflicts with the requirements of a collective bargaining agreement. Pet. App. No. 89-1027 at 12a, 19a. Section 11341(a) provides that a carrier participating in an approved control transaction "is exempt from the antitrust laws and from *all other law*, including State and municipal law, as necessary to let that person carry out the transaction . . .." (Emphasis added.)

In the court of appeals' view, "all other law" comprehends only "positive enactments, not common law rules of liability, as on a contract." Pet. App. No. 89-1027 at 18a.[3]

[3] The previous version of § 11341(a), former § 5(11) of the ICA, immunized participants "from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal," thus making clear that the immunity encompasses not only positive enactments, but all restraints, limitations and prohibitions of law. The 1978 recodification of this provision as § 11341(a) did not effect any substantive change. Act of Oct. 13, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466. *See also* H.R. Rep. No. 95-1395, 95th Cong., 2d Sess. 158-68 (1978).

This narrow interpretation of the meaning of "law" harks back to another case involving a railroad decided more than half a century ago. The issue in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), was whether the phrase "laws of the several states" as used in the Rules of Decision Act, 28 U.S.C. § 1652, meant only statutory law or included common law. This Court held, of course, that "laws" meant both.[4]

Section 11341(a) therefore does not support the meaning the court of appeals gave it. To be sure, Section 11341(a) does not expressly refer to contracts. But contracts can impede control transactions because they have the force of law behind them—that is, because they are legally enforceable.[5] Thus, prior decisions had recognized

---

[4] *See also Munn* v. *Illinois*, 94 U.S. 113, 125-26, 133-34 (1877) (power to regulate commerce is superior to the power of private citizens to create rights at common law where the subject matter is affected with a public interest); *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (ICA abandonment procedures preempt state tort claims based on alleged violation of state common law); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 246-47 (1959) (Supremacy Clause preempts state common law rights that interfere with federal policies); *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (ICA preempts state common law action by shipper for allegedly unreasonable rate).

Similarly, this Court has long held that the federal government acting lawfully under the Commerce Clause may modify private contracts concerning matters within the government's regulatory powers without violating the Fifth Amendment. *Connolly* v. *PBGC*, 475 U.S. 211, 225 (1986); *Norman* v. *Baltimore & O. R.R.*, 294 U.S. 240, 306 (1935).

[5] Moreover, the law giving effect to collective bargaining agreements is not the common law, but a "positive enactment," the Railway Labor Act ("RLA"), *see* 45 U.S.C. § 152 Seventh. *Detroit & Toledo Shore Line R.R.* v. *United Transp. Union*, 396 U.S. 142, 156 (1969) (§ 152 Seventh of RLA "operates to give legal and binding effect to collective agreements"); *Andrews* v. *Louisville & Nashville R.R.*,



that Section 11341(a) immunizes participants from all legal obstacles, not simply from positive enactments. *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794, 800 (1st Cir. 1986), *cert. denied*, 479 U.S. 829 (1987); *Brotherhood of Locomotive Engineers* v. *ICC*, 761 F.2d 714, 717, 723 (D.C. Cir. 1985), *rev'd on other grounds*, 482 U.S. 270 (1987).

2. This was also the Commission's interpretation of Section 11341(a) and, under *Chevron*, *supra*, the court of appeals was bound to respect it. The Commission clearly and succinctly stated its interpretation of Section 11341(a) in two recent rail cases before this Court.[6]

---

406 U.S. 320 (1972) (rail labor agreements not enforceable in state court). Thus, even assuming the court of appeals' distinction between common law and positive enactments were correct, its holding is nevertheless clearly erroneous and should be reversed.

[6] In its Petition for a Writ of Certiorari at 14-15, *ICC* v. *Brotherhood of Locomotive Engineers*, No. 85-792, Oct. Term, 1985, the Commission stated that, under § 11341(a), "the Commission's power to approve consolidations includes the power to approve transactions which require the negotiation of changes in working conditions and to establish the means by which negotiation of such changes shall be effected" and that "if the Commission does so, RLA processes for resolving labor problems arising directly out of the approved transactions are overridden by virtue of . . . Section 11341(a)." "Such a result is necessary because no activity by any party can be allowed to frustrate consummation of the transaction authorized by the Commission and the public interest in that transaction which the Commission's approval entails." Brief for the Interstate Commerce Commission at 20, *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Execs' Ass'n*, No. 87-1589, Oct. Term, 1988.

The Commission has routinely applied this interpretation in its jurisprudence. *E.g.*, *Maine Central R.R.—Exemption from 49 U.S.C. 11342 and 11343*, Fin. Docket No. 30,532 (decision served Sept. 16, 1985), *aff'd mem. sub nom. Railway Labor Execs' Ass'n* v. *ICC*, 812 F.2d 1443 (D.C. Cir. 1987); *Denver & Rio Grande Western*

Early in its opinion, the court correctly cited *Chevron* for the proposition that judicial deference is inappropriate if "Congress has directly spoken to the precise question at issue" (*Chevron*, 467 U.S. at 842-43). Pet. App. No. 89-1027 at 11a. The court then proceeded to "strike out" in search of Congress' intent. *Id.* The court's search, however, revealed no "unambiguously expressed intent of Congress" (*Chevron*, 467 U.S. at 843) to exclude collective bargaining agreements from the scope of Section 11341(a) immunity. Pet. App. No. 89-1027 at 12a-19a. The most the court could say on this score was that Congress had never directly faced the question. *Id.* at 18a.[7]

Under *Chevron*, the court was then required to advance to the second step of analysis—namely, to determine whether the Commission's interpretation of Section 11341(a) was permissible. *Chevron*, 467 U.S. at 843.

---

*R.R.—Trackage Rights—Missouri Pac. R.R.*, Fin. Docket No. 30,000 (Sub-No. 18) (decision served Oct. 25, 1983), *vacated on other grounds sub nom. Brotherhood of Locomotive Engineers* v. *ICC*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd*, 482 U.S. 270 (1987).

The United States has interpreted § 11341(a) the same way. Brief for the Interstate Commerce Commission and the United States of America at 24, *ICC* v. *Brotherhood of Locomotive Engineers*, No. 85-792, Oct. Term, 1985 ("Section 11341(a) automatically confers an exemption of sufficient breadth to permit implementation of the authorized transaction"); Brief for the United States as *Amicus Curiae* at 9 n.8, *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Execs' Ass'n*, No. 87-1589, Oct. Term, 1988.

[7] We submit that the court of appeals erred when it concluded that Congress had not spoken directly to the issue in enacting § 11341(a). As we have shown (*see supra* at 3-5), the language of the statute is clear, and it is equally clear that Congress intended to immunize carriers not merely from positive enactments, but from all restraints, limitations and prohibitions of law.



Instead of doing so, however, the court simply supplied its judgment regarding the meaning of Section 11341(a).[8]

---

[8] Further, contrary to the court of appeals' belief, the legislative history of the Transportation Act of 1920 does not support its interpretation of § 11341(a). While Congress was undoubtedly concerned with protecting carriers from the Clayton Act and certain state statutes, it chose immunity language broadly covering "all restraints, limitations, and prohibitions of law." *See supra* n.3. Moreover, Title III of the 1920 Act provided for comprehensive regulation of collective bargaining for the rail industry, and Congress did *not* exempt that Title from the 1920 Act's public interest regulation or its immunity provision. The lack of such exemption is especially significant because Congress expressly provided that at least two other sections of the 1920 Act *were* exempt from these provisions. *See* § 400 of the Transportation Act of 1920, ch. 91, 41 Stat. 456, 474-75 (amending § 1 of the ICA so as not to apply to interstate activities and certain water carrier activities); § 402 of the Transportation Act of 1920, ch. 91, 41 Stat. 456, 476-78 (amending § 1 of the ICA so as not to apply to spur and industrial tracks).

Moreover, when Congress enacted the RLA in 1926, it did not exempt labor matters from the ICC's delegated powers under current §§ 11343 and 11344 and the immunity from all other law under current § 11341(a). Finally, in 1933 Congress enacted the Emergency Railroad Transportation Act ("ERTA"), ch. 91, 48 Stat. 211. Title I of ERTA was temporary legislation limited to a one-year period, and contained a savings clause for RLA rights and labor contracts: "nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act." 48 Stat. at 215. Title II of ERTA restated current § 11344 of the ICA, with the same public interest standard for approval of control transactions, and continued current § 11341(a) immunity. Unlike Title I, however, Title II contained no RLA or collective bargaining agreement savings clause. If Congress had intended to remove the RLA and collective bargaining agreements from §§ 11343 and 11344 public interest regulation and § 11341(a) immunity, it would have extended the Title I savings clause to Title II. Its decision not to do so reflects "an intentional distinction." *Texas* v. *United States*, 292 U.S. 522, 534 (1934).

While the court of appeals did not specifically explain its refusal to address the second part of the *Chevron* test, it suggested that deference was not warranted because it believed the Commission had previously interpreted the statute differently. Pet. App. No. 89-1027 at 13a (citing *Gulf, Mobile & Ohio R.R.—Abandonment*, 282 I.C.C. 311, 335 (1952)); *id.* at 22a-23a. But as Justice Scalia recently explained, "there is no apparent justification for holding the agency to its first answer, or penalizing it for a change of mind. *** [T]here seems to me no reason to value a new interpretation less than an old one." Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517, 518 (1989). Moreover, the court of appeals was not correct that the Commission had changed its mind. The *Gulf, Mobile* case was a line abandonment case, not a control transaction, and Section 11341(a) was therefore not at issue.[9]

At all events, the Commission's interpretation of Section 11341(a) was permissible and thus entitled to deference.[10] In addition to the plain language of the statute

[9] If anything, *Gulf, Mobile* is consistent with the Commission's longstanding interpretation of Section 11341(a). The Commission held that it could not override contracts in abandonment cases absent "a clear grant of statutory authority similar to that contained in [§ 11341(a)]." 282 I.C.C. at 335.

[10] Despite its longstanding interpretation of § 11341(a), the Commission has stated that it does not "dispute the validity" of the court of appeals' decision. *Brandywine Valley R.R.—Purchase—CSX Transp., Inc.*, 5 I.C.C.2d 764, 772 n.5 (1989). We assume that this statement simply reflects the Commission's intent to comply, as it must, with the court of appeals' decision on the basis of law of the case and *stare decisis* principles, and does not reflect Commission approval of the court of appeals' interpretation of § 11341(a).

The Commission's present position in no way moots the issue in these cases. Indeed, the Commission's apparent acquiescence is itself a compelling reason for this Court to review the decision below: if the ICC is allowed to acquiesce, the decision below will become the law of the land, thus "overruling" this Court's decision in *Schwabacher, supra*.



(and its predecessor version), the numerous decisions of this Court holding that the ICA preempts state common law and private rights based on common law support the Commission's interpretation of Section 11341(a).

Moreover, the primary goal of the ICA since enactment of the Transportation Act of 1920 has been to encourage and facilitate control transactions in order to promote efficiency and strengthen the railroad economy. S. Rep. No. 1182, 76th Cong., 3d Sess. Pt. 1, 1 (1940) (Transportation Act of 1920 was designed to "encourage[] mergers and consolidations of railroad companies, under the supervision of the Interstate Commerce Commission, in the hope of bringing about a stronger national railroad economy"); *County of Marin* v. *United States*, 356 U.S. 412, 416 (1958) (Transportation Act of 1940 was designed "to facilitate merger and consolidation in the national transportation system"); *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2596-97 (1989) (Railroad Revitalization and Regulatory Reform Act of 1976 and Staggers Act of 1980 were "aimed at reversing the rail industry's decline through deregulatory efforts, above all by streamlining procedures to effectuate economically efficient transactions"). The Commission's interpretation of Section 11341(a) is consistent with and promotes this goal.

Finally, Congress has given the Commission exclusive and plenary jurisdiction over control transactions. Section 11341(a) states that the ICC's power over control transactions "is exclusive." The enacted version of Section

11341(a), which was recodified without substantive change (*see supra* n.3), stated that the ICC's power over such transactions "shall be exclusive and plenary." This Court has recognized that the ICC has "plenary authority over rail transportation" (*Pittsburgh & Lake Erie R.R.*, *supra*, 109 S. Ct. at 2596) and that Congress has delegated to the ICC the power to accommodate public and private interests in control transactions (*United States* v. *Lowden*, 308 U.S. 225, 234-38 (1939)). The Commission's exclusive and plenary jurisdiction in this area is a compelling reason to defer to its interpretation.

3. Congress has ensured that the interests of railroad employees remain fully protected notwithstanding Section 11341(a). Since this Court's decision in *Lowden*, *supra*, it is clear that the Commission must consider employee interests as part of its public interest determination in control transactions. *See also* 49 U.S.C. § 11344(b)(1). Moreover, under Section 11347 of the ICA, 49 U.S.C. § 11347, the Commission is required to impose minimum conditions in favor of railroad employees in *every* control transaction. The Commission must require the carriers to provide employees with a "fair arrangement" adequately protecting their interests. The minimum conditions the ICC must impose include six years of wage and benefit guarantees and seniority adjustment procedures. The Commission, of course, may impose additional conditions in favor of employees. Finally, immunity is accorded only when necessary to enable the participating carriers to carry out the transaction as approved by the ICC.

4. The court of appeals' decision is contrary to this Court's decision in *Schwabacher*, *supra*. *Schwabacher* involved the merger of the Pere Marquette Railway with another carrier. A group of dissenting Pere Marquette



shareholders claimed that under the Pere Marquette charter, a contract enforceable under Michigan law, they were entitled to receive a certain amount for each share of stock; they challenged the merger because it provided them substantially less than that amount and thereby deprived them "of contract rights under Michigan law." *Schwabacher*, 334 U.S. at 188. The ICC approved the proposed merger, but stated that the dissenting shareholders could pursue their contract claim in state court. *Id.*

This Court rejected the ICC's approach. Relying on Section 11341(a), the Court held that once the Commission approved the merger, the new entity was relieved of any claims based on contract rights allegedly conferred by the Pere Marquette charter. *Id.* at 194-95, 201-02.[11] *See also ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 298 (1987) (Stevens, Brennan, Marshall and Blackmun, JJ., concurring) ("[t]he breadth of the [Section 11341(a) immunity] is defined by the scope of the approved transaction"). Following *Schwabacher*, every court of appeals that has addressed the issue (except for the court below) has held that the immunity provision at issue in these cases immunizes carriers participating in an ICC-approved transaction from any obligations they would

[11] According to the court of appeals, *Schwabacher* stands only for the proposition that the "ICC may override state law granting dissenting shareholders [the] right to block [a] merger." Pet. App. No. 89-1027 at 21a. *Schwabacher* is not so limited. Michigan law did not give shareholders any substantive rights. Rather, those rights were provided contractually by the Pere Marquette charter. Michigan law simply provided that, in the case of a merger, any preexisting obligations of the merging companies (e.g., contractual obligations) attached against the new corporation. *See* Pet. No. 89-1027 at 12-13 & n.15.

otherwise have under the RLA or collective bargaining agreements, when such immunity was necessary to let them carry out the transaction.[12]

5. These cases are of great importance to the rail industry. Rail carriers face vigorous competition, not only from each other but also from other modes of transportation. To meet that competition, rail carriers have continually strived to make themselves more competitive—and their services more attractive to consumers—through control transactions, which enable them to improve efficiency by eliminating duplicative facilities. Rail carriers have planned and undertaken their activities and investments on the assumption, grounded in the ICA and relevant case law, that if efficiency and the public interest require control transactions, Section 11341(a) immunity would allow them to implement and achieve the efficiencies and other public interest benefits envisioned by the ICC when it approves the transaction, free from the impediments imposed by legal obstacles (including collective bargaining agreements) when such immunity is necessary.

Under the decision below, however, rail carriers may, in effect, first have to obtain the consent of railway labor before engaging in control transactions that could affect collective bargaining agreements. Unless the Section

---

[12] *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry.*, 314 F.2d 424, 431-32 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963); *Boston & Maine Corp.*, *supra*, 788 F.2d at 800; *Nemitz* v. *Norfolk & Western Ry.*, 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971); *Missouri Pac. R.R.* v. *United Transp. Union*, 782 F.2d 107, 111-12 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987); *Burlington Northern, Inc.* v. *American Ry. Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974) (per curiam), *cert. denied*, 421 U.S. 975 (1975).



11341(a) immunity encompasses all legal obstacles as necessary to carry out approved control transactions, railway labor will have veto power over control transactions that the ICC has found to be in the public interest but that might affect collective bargaining agreements.[13] The Commission itself has recognized this danger.[14]

The decision of the court of appeals thus threatens to frustrate achievement of the public interest benefits of approved control transactions and deter future control transactions designed to make rail transportation even more competitive and beneficial to the consumer: rail carriers are far less likely to enter into control transactions if railway labor need merely assert collective bargaining rights to prevent the very changes motivating the transactions and making them in the public interest. In short, the decision below may chill a broad range of efficiency-enhancing control transactions, thereby inhibiting

---

[13] Absent § 11341(a), if railway labor does not consent to an implementing change, the matter proceeds to negotiation pursuant to the procedures of the RLA. But, as this Court has recognized, the RLA procedures "are purposely long and drawn out" (*Brotherhood of Ry. & Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 246 (1966)), and thus effectively preclude carriers from carrying out the transaction if labor does not consent at the outset.

[14] Brief for the Interstate Commerce Commission at 34, *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Execs' Ass'n*, No. 87-1589, Oct. Term, 1988:

> Any determination by the Commission that labor protections are not appropriate to a rail transaction becomes purely advisory if the transaction is subject to the RLA. Any rail transaction is henceforth subject to a rail labor veto with the invocation of the RLA. The Commission's determination about the public interest with respect to the transaction which is required to take into account among other things the interests of rail employees becomes a nullity.

rail carriers' ability to compete, all to the ultimate detriment of the consumer.

6. Despite their longstanding interpretation of Section 11341(a) and the Commission's numerous decisions giving effect to that interpretation (*see supra* n.6), the federal respondents urge the Court to deny as "premature" the petitions for writs of certiorari in these cases. Brief for the Federal Respondents in Opposition at 11. The federal respondents assert that "the Commission is presently exploring a variety of alternative bases . . . for allowing approved consolidations to go forward without resort to the extended bargaining procedures required by the RLA" and that "[i]t is entirely possible that the Commission will adopt a position on one or more of these alternatives that may obviate the difficulties entailed by the court of appeals' decision. *** Thus, the Commission's ultimate disposition of the case on remand may not be affected by the court of appeals' present decision." *Id.* at 11-12.

Contrary to the assertion of the federal respondents, the Commission's proceedings on remand will not obviate the need for review of the question presented. In a February 9, 1990 voting conference in this matter, the Commission made clear that it does not intend to dispute or challenge the court of appeals' interpretation of Section 11341(a) in its decision on remand. Transcript of Voting Conference at 14-15, 63-65, 74-75, *CSX Corp.—Control—Chessie System, Inc.*, Finance Docket No. 28,905 (Sub-No. 22) (Feb. 9, 1990). Proceedings on remand will therefore add nothing to the existing record with regard to the question presented by the instant petitions.

Moreover, the Commission's decision on remand will address issues relating only to labor. *Id.* But the court of



appeals' decision may be applied not only to collective bargaining agreements, but also to other private contracts. The Commission's decision on remand will not affect this important aspect of the decision below.

Thus, the question presented by these petitions is now ripe. Nothing can be gained from further delay. Without prompt review of the judgment, corporate planning decisions will be significantly disrupted and the resulting uncertainty will adversely affect the public interest. *See supra* at 2, 12-14.[15]

## CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be granted.

Respectfully submitted,

BRUCE B. WILSON
CONSTANCE L. ABRAMS
JOHN B. ROSSI, JR.
CONSOLIDATED RAIL CORPORATION
1138 Six Penn Center Plaza
Philadelphia, PA 19103
Telephone: (215) 977-4041

A. RAYMOND RANDOLPH
*Counsel of Record*
PAUL A. CUNNINGHAM
DENNIS A. AROUCA
JAMES A. MEYERS
PEPPER, HAMILTON & SCHEETZ
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
Telephone: (202) 828-1200
*Attorneys for*
*Consolidated Rail Corporation*

Dated: February 28, 1990

---

[15] We submit that, even if this Court were to accept the federal respondents' invitation to wait until completion of the proceedings on remand (along with appellate review of such proceedings), it should not deny the petitions in these cases. Rather, it should defer their consideration so that it may consider the question they present at the same time it considers the issues presented by the remand proceeding.

Supreme Court, U.S.
FILED
MAY 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 89-1027 and 89-1028

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

---

NORFOLK & WESTERN RAILWAY COMPANY and
SOUTHERN RAILWAY COMPANY,
*Petitioners,*

v.

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, *et al.*,
*Respondents.*

---

CSX TRANSPORTATION, INC.,
*Petitioner,*

v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
*Respondents.*

---

**On Writs of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

---

## MOTION TO DISMISS

---

WILLIAM G. MAHONEY
(Counsel of Record)
JOHN O'B. CLARKE, JR.
HIGHSAW, MAHONEY &
CLARKE, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500
*Attorneys for Union Respondents
American Train Dispatchers'
Association and Brotherhood
of Railway Carmen*

Date: May 24, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| BACKGROUND OF MOTION | 2 |
| ARGUMENT | 4 |
| CONCLUSION | 6 |

## TABLE OF AUTHORITIES


| *CASES RELIED UPON:* | Page |
|---|---|
| *Brandywine Valley Railroad Company-Purchase-CSX Transportation, Inc., Lines in Florida* 5 I.C.C.2d 764 (1989) | 3, 5 |
| *Piccirillo v. New York*, 400 U.S. 548 (1971) | 4 |
| *Triangle Improvement Council, et al. v. Ritchie, et al.*, 402 U.S. 497 (1971) | 6 |
| *STATUTES AND OTHER MATERIALS:* | |
| Interstate Commerce Act, 49 U.S.C. §§ 10101, *et seq.* | 2, 4 |
| Section 11341 (a), 49 U.S.C. § 11341 (a) | 2, 5, 6 |
| Section 11347, 49 U.S.C. § 11347 | *passim* |
| Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* | 4 |
| Section 2 Fourth, 45 U.S.C. § 152 Fourth | 2 |


IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

---

Nos. 89-1027 and 89-1028

---

NORFOLK & WESTERN RAILWAY COMPANY and
SOUTHERN RAILWAY COMPANY,
*Petitioners,*

v.

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, *et al.*,
*Respondents.*

---

CSX TRANSPORTATION, INC.,
*Petitioner,*

v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
*Respondents.*

---

**On Writs of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

---

## MOTION TO DISMISS

---

Come now American Train Dispatchers' Association and Brotherhood of Railway Carmen, [hereinafter, "union

respondents"], and respectfully move, pursuant to Rule 21, that the Writs of Certiororai entered herein be dismissed as the issue presented in those Writs has been rendered moot by recent actions of the Interstate Commerce Commission [hereinafter, "Commission" or "ICC"] in these cases which are now pending before it on remand from the United States Court of Appeals for the District of Columbia Circuit. Alternatively, the Writs should be dismissed as no longer presenting an important question of federal law which should be settled by this Court.

## BACKGROUND OF MOTION

These cases resulted from appeals to the United States Court of Appeals for the District of Columbia Circuit from orders of the Commission affirming arbitration awards issued pursuant to ICC conditions attached to orders approving separate railroad control and merger cases involving the railroad petitioners herein.

Union respondents contended that the arbitrators, and the Commission in affirming their awards, had exceeded the statutory authority provided by the Congress in the Interstate Commerce Act, 49 U.S.C. §§ 10101, *et seq.*, particularly sections 11341(a) and 11347 of that Act. The union respondents also contended that the ICC had applied an improper standard in reversing that part of the award in the *Carmen*'s case which had been in favor of the Carmen and, in the *Dispatcher*'s case, the Commission had deprived employees of their rights in violation of Section 2 Fourth of the Railway Labor Act, 45 U.S.C. § 152 Fourth.

The Court of Appeals ruled that because "§ 11341(a) of the Act does not grant the ICC its claimed power to override the provisions of a CBA [collective bargaining agreement] between a carrier and its employees", the ICC's decisions should be reversed and remanded with respect to the ICC's Railway Labor Act holdings "in order that the agency may determine whether further proceedings are necessary". (Petitioners' Appendix at 26a in No. 89-1028.) The court did not rule on the other issue presented to it.



The railroad petitioners herein filed petitions for rehearing with the Court of Appeals with suggestions for rehearings *en banc*. The petitions were denied (No. 89-1028, App. at 30a, 31a). The Commission filed a petition for rehearing on which consideration by the court was deferred pending release of the ICC's decision on remand (*id.* at 32a). That petition is still pending.

Following remand to it, the full Commission ordered argument by all parties to be held on January 4, 1990, on the question of ICC authority under the Act, particularly section 11347 thereof. The Commission had stated in a decision in another case issued soon after the Court of Appeals' decision had issued that it did not dispute the validity of the holding of the court in the instant cases and, indeed, claimed never to have relied upon its authority under § 11341(a) to override contracts while conceding that it had "been less than precise in articulating . . . [that] authority." *Brandywine Valley Railroad Company-Purchase-CSX Transportation, Inc., Lines in Florida*, 5 I.C.C.2d 764, 772 n.5 (1989).

On or about December 27, 1989, the petitioners filed their petitions for writs of certiorari to the Court of Appeals. These petitions were opposed by the ICC, the United States[1] and the union respondents as premature. This Court granted the petitions on March 26, 1990.

On February 9, 1990, the Commission held an open voting conference on the cases remanded to it, voted to reaffirm its authority under Section 11347 to override collective bargaining agreements and instructed its staff to prepare a written decision in accordance with its vote and its oral discussion of the cases.

---

[1] The United States declined to take a position in either case before the Court of Appeals.

At a May 15, 1990 open voting conference involving a number of cases, the Commission voted unanimously to adopt its staff's sixty-page written decision on remand and to release the decision to the public as soon as it had been readied for distribution.

On May 17, 1990, the Commission published a news release announcing the results of the May 15, 1990 voting conference. According to the news release, a copy of which is appended to this motion, the Commission is taking a "new approach" to the issues before it in these cases and in "light of the new approach stated in its decision [not yet released], the Commission reversed and vacated the two arbitration awards under review in these cases and remanded them for further negotiation by the involved parties and for consideration by arbitrators if necessary in accordance with the decision."

## ARGUMENT

The case before this Court arose from two Commission decisions affirming two arbitration awards. The Commission on remand from the Court of Appeals has now, according to its news release, reversed and vacated those same arbitration awards and remanded the cases to the petitioner railroads and union respondents for further negotiation and later consideration by arbitrators, if necessary. This action of the ICC has effectively mooted the issue before this Court as to all parties. *Cf. Piccirillo v. New York*, 400 U.S. 548, 549 (1971).

The Commission indicates that it had determined from a study of the relationship between the Interstate Commerce Act and the Railway Labor Act over the past 50 years and in accordance with the practice between 1940 and 1980 growing out of the Washington Job Protection Agreement, that "collective bargaining agreements could be modified under 49 U.S.C. 11347 and the ICC's employee-protection conditions, but only with respect to the selection of work forces and the assignment of employees



—with some qualifications—and only to the extent necessary to permit the carrying out of a merger or consolidation". The Commission also concludes that "[e]mployees' contract rights are otherwise to be preserved and their traditional right to bargain over rates of pay, *rules*, and *working conditions* is not to be undermined". (Emphasis supplied.)

The Commission evidently has determined that regardless of what may be this Court's ruling on the issue pending before it, it is section 11347, not section 11341(a), that governs and restricts its actions in merger and control cases with regard to employees' contract and Railway Labor Act rights.

This "new approach", in the Commission's words, has constrained it to reverse and vacate the arbitration awards which it had previously affirmed and remand the cases for negotiations between the respective railroad and union parties. If the parties are unable to resolve their differences by negotiation, arbitration will be ordered. However, those negotiations and that arbitration will be conducted against the background of the ICC's "new approach" to the goveranance and restrictions of section 11347.

The existing differences between the railroad petitioners and union respondents may be eliminated by negotiations or arbitrations or review of the arbitrations by the ICC.[2] If not, the pending Commission petition for rehearing before the Court of Appeals could be reactivated. In any event, the issue of the meaning and effect of section 11341(a) is no longer material to the pending disputes which, if they remain unresolved, will again be before this Court on the issue of the Commission's authority under section 11347. Finally, it is this new approach of Commission reliance on section 11347, instead

---

[2] Any existing differences between union respondents and respondent ICC involving the effect of section 11341(a) upon collective bargaining agreements were eliminated when the ICC issued its *Brandywine* decision, *supra*, page 3.

of section 11341(a), that will govern all future railroad merger and control cases arising under the Intertsate Commerce Act, unless changed by a future ruling of this Court on a future review of these actions of the ICC.

Additionally, even were one to conclude that the recent actions of the Commission have not rendered wholly academic the issue of the effect of section 11341(a) as authority to override collective bargaining agreements, those actions certainly have drained the cases as currently presented to this Court of any general importance for future railroad merger and control cases approved pursuant to the Interstate Commerce Act. *Cf. Triangle Improvement Council, et al. v. Ritchie, et al.*, 402 U.S. 497, 499 (1971).

## CONCLUSION

For these reasons, union respondents respectfully submit that the issue now before this Court on writs of certiorari has been rendered moot by the recent actions of the Commission or, at the least, has lost any stature as an important question of federal law that this Court should decide and that the writs now should be dismissed.

Respectfully submitted,

WILLIAM G. MAHONEY
(Counsel of Record)
JOHN O'B. CLARKE, JR.
HIGHSAW, MAHONEY &
CLARKE, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500
*Attorneys for Union Respondents*
*American Train Dispatchers'*
*Association and Brotherhood*
*of Railway Carmen*

Date: May 24, 1990

# APPENDIX

**APPENDIX**

INTERSTATE COMMERCE COMMISSION
ICC NEWS
12th & Constitution Avenue N.W.
Washington, D.C. 20423

FOR RELEASE
Thursday, May 17, 1990
No. 90-67

Contact: Dennis Watson
(202) 275-7252

## ICC ISSUES RESULTS OF MAY 15 VOTING CONFERENCE

Interstate Commerce Commission Chairman Edward J. Philbin has announced the results of the Commission's May 15 voting conference in several railroad cases.

The cases and respective voting results are described in the sequence in which they were considered and voted upon by the Commission.

• Finance Docket No. 31532, *Indiana Hi-Rail Corporation—Lease and Operation Exemption—Norfolk and Western Railway Company Line Between Douglas, OH and Van Buren, IN*, involving the issue of whether the Commission should grant Indiana Hi-Rail Corporation's petition for reconsideration of a 1989 Commission order denying Indiana Hi-Rail's request for exemption from the ICC's tariff-filing and reporting requirements. The Commission, voted to postpone action on the petition until Indiana Hi-Rail provides additional information.

• Docket No. AB-12 (Sub-No. 118X), *Southern Pacific Transportation Company—Exemption—Abandonment of Service in San Mateo County, CA*, involving the issue of whether a 1989 Commission Notice of Interim Trails Use should be revoked for an approximately 1.2-mile segment of the Southern Pacific "Ravenswood Branch" line in San Mateo County, California. The Commission voted to (1)

consider petitions of the National Association of Reversionary Property Owners and Mr. Horace Robertson seeking administrative review or reconsideration of the ICC's 1989 decision; (2) seek additional information to determine whether the segment in question is a "spur" track which falls outside the Commission's abandonment jurisdiction; and, (3) explore whether or not abandonment has been consummated in this instance.

• Docket No. AB-263 (Sub-No. 2X), *Staten Island Railway Corporation—Abandonment Exemption—In Richmond County, NY*, involving the Staten Island Railway's request for an exemption from the Commission's prior-approval regulations for the abandonment of its 3.65-mile "Travis Branch" line in Richmond County, New York. The Commission voted to grant the exemption.

• Ex Parte No. 346 (Sub-No. 26), *Association of American Railroads—Petition to Exempt Industrial Development Activities from 49 U.S.C. 10761(a), 10762 (a)(1), 11902, 11903, and 11904(a)*, involving the issue of whether the Commission should issue a notice of proposed rulemaking requesting public comment on the Association of American Railroad's (AAR) petition for a limited exemption from the anti-rebating (Elkins Act) provisions of the Interstate Commerce Act to permit railroads to engage in certain market development activities. The Commission voted generally to accept the AAR's petition for purposes of initiating an advance notice of proposed rulemaking that would include participation by the public, the U.S. Department of Justice, and the Commission's Office of Compliance and Consumer Assistance.

• Finance Docket No. 28905 (Sub-No. 22), *CSX Corporation—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, and Finance Docket No. 29430 (Sub-No. 20), *Norfolk Southern Corporation—Control—Norfolk and Western Railway Company and Southern Railway Company*, involving issues on "remand" (that is, issues for reconsideration) by the U.S. Court of Appeals for the District of Columbia Circuit.



The Commission voted to issue a decision reviewing the relationship between the Interstate Commerce Act and the Railway Labor Act in connection with the treatment of employees in mergers and consolidations over the past 50 years. The decision balances the railroads' need to expect prompt consummation of ICC-approved transactions and the rights of employees to bargain collectively over their terms of employment. The Commission ruled that, in accord with the practice between 1940 and 1980 growing out of the Washington Job Protection Agreement, collective bargaining agreements could be modified under 49 U.S.C. 11347 and the ICC's employee-protective conditions, but only with respect to the selection of work forces and the assignment of employees—with some qualifications—and only to the extent necessary to permit the carrying out of a merger or consolidation. Employees' contract rights are otherwise to be preserved and their traditional right to bargain over their pay, rules, and working conditions is not to be undermined.

In light of the new approach stated in its decision, the Commission reversed and vacated the two arbitration awards under review in these cases and remanded them for further negotiation by the involved parties and for consideration by arbitrators if necessary in accordance with the decision.

• Finance Docket No. 31530, *Wilmington Terminal Railroad, Inc.—Purchase and Lease—CSX Transportation, Inc. Lines Between Savannah and Rhine, and Vidalia and Macon, GA*, involving a request for Commission approval for Wilmington Terminal Railroad's purchase and lease from CSX of two connected rail lines—totaling approximately 224 miles—between Savannah and Rhine and Vidalia and Macon, Georgia, and the question of what type of labor-protective conditions should be imposed on the transaction.

Here, the Commission's vote clarified the obligation of buyers and sellers of railroad lines to protect and negotiate with employees affected by a line sale. In so doing, a majority of the Commission eliminated the obligation of a buyer to negotiate an implementing agreement with the employees of the seller, an obligation which had been imposed by the Commission for the first time in Finance Docket No. 31393, *Brandywine Valley R.R. Co.—Purchase—CSX Transp., Inc., Lines in Florida*, 5 I.C.C.2d 764 (1989). This clarification, based on a study of the Commission's past approach to labor protection in lines sales, requires the seller to negotiate with affected employees an implementing agreement to reflect diminished work and afford them full protection, with no penalty for failure to take any position offered by the buyer. The buyer would be required to negotiate an implementing agreement with its employees, and to discuss—but not to negotiate—with the seller's employees the basis on which the buyer would be willing to offer positions to the seller's employees.

If these requirements are followed, the Commission was of the view that implementation of the transaction would not be inconsistent with any rights or obligations to negotiate arising under the Railway Labor Act (RLA), since no collective bargaining agreements are modified. As a result, a majority of the Commission found no need at this time to issue a declaration sought by CSX to the effect that any rights to negotiate which might be believed to arise from the rail unions' service of Section 6 notices would be overridden under the provisions of 49 U.S.C. 11341(a) as a result of the Commission's approval of the transaction under Section 11344 of the Interstate Commerce Act. The rail unions have served Section 6 notices on all of the railroads collectively, and some carriers individually, including CSX, seeking to modify existing collective bargaining agreements to require a selling carrier to include in contracts of sale a provision that the purchaser would take on existing em-



ployees, collective bargaining agreements, and union representation.

The Commission also found that it was not required by Section 11347 of the Interstate Commerce Act or its own conditions to require a purchaser to assume the seller's employees, collective bargaining agreements, and union representation, as contended by certain rail labor parties. The Commission further found that no basis had been shown for imposing a preferential hiring requirement on Wilmington Terminal in this case as a matter of its own discretion. Commissioner Lamboley would have imposed a preferential hiring requirement.

The Commission did not vote in the May 15 conference on Docket No. 37626, *Consolidated Papers, Inc., et al.* v. *Chicago and North Western Transportation, et al.*, involving the issue of whether the defendant railroads have market dominance over the transportation of pulpwood and wood chips from Michigan, Minnesota, South Dakota, Wyoming, Colorado, and Montana to the midwestern mills of four Wisconsin paper manufacturers. The Commissioners instead voted by "notation" (registering their votes on paper) on several technical issues. A summary reflecting that vote was issued May 15.

(1) (8)

FILED
MAY 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 89-1027 and 89-1028

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

---

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
*Petitioners,*

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
*Respondents.*

---

CSX TRANSPORTATION, INC.,
*Petitioner,*

v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
*Respondents.*

---

**On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

---

## JOINT APPENDIX

---

JEFFREY S. BERLIN*
RICHARDSON, BERLIN & MORVILLO
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8902

*Counsel for Petitioners Norfolk and Western Railway Company and Southern Railway Company*

JAMES S. WHITEHEAD*
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703

*Counsel for Petitioner CSX Transportation, Inc.*

[Additional Counsel Listed on Inside Front Cover]

---

**PETITIONS FOR CERTIORARI FILED DECEMBER 28, 1989**
**CERTIORARI GRANTED MARCH 26, 1990**

BEST AVAILABLE COPY

JOHN G. ROBERTS, JR.
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
General Counsel
Interstate Commerce
Commission
Washington, D.C. 20423
(202) 275-7312

*Counsel for the Federal Respondents*

WILLIAM G. MAHONEY*
HIGHSAW, MAHONEY &
CLARKE, P.C.
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

*Counsel for Respondents American Train Dispatchers Association and Brotherhood of Railway Carmen*

**Counsel of Record*

BEST AVAILABLE COPY

## TABLE OF CONTENTS


| | Page |
|---|---|
| Notation Regarding Items Previously Reproduced | JA-1 |
| Chronological List of Relevant Docket Entries | JA-4 |
| Decision and Award, *Norfolk & Western Ry., et al. and American Train Dispatchers Association*, May 19, 1987 (Harris Arb.) | JA-8 |
| Decision, *Norfolk Southern Corp.—Control—Norfolk & Western Ry. and Southern Ry.*, ICC Finance Docket No. 29430 (Sub-No. 20), June 5, 1987 | JA-33 |
| Decision, *CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, ICC Finance Docket No. 28905 (Sub-No. 22), June 5, 1987 | JA-39 |
| Order of the United States Supreme Court, March 26, 1990 (granting certiorari and consolidating cases Nos. 89-1027 and 89-1028) | JA-43 |

## NOTATION REGARDING ITEMS PREVIOUSLY REPRODUCED

The opinions, decisions, judgments, and orders indicated below have been omitted in printing this joint appendix because they appear, at the pages indicated below, in the appendix to the printed Petition For A Writ of Certiorari in case number 89-1027 and/or in the separately bound appendix to the printed Petition For A Writ of Certiorari in case number 89-1028.


Page

Opinion and Award, *In the Matter of the Arbitration Between Brotherhood Railway Carmen-Division Of BRAC, Organization, and CSX Transportation, Inc. and the Chesapeake and Ohio Railway Company, Carriers,* March 23, 1987 ..... 53a (89-1028)

Decision, *Norfolk Southern Corp.—Control—Norfolk & Western Ry. and Southern Ry.*, ICC Finance Docket No. 29430 (Sub-No. 20), May 24, 1988 ..... 29a (89-1027)

Decision, *CSX Corporation—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, ICC Finance Docket No. 28905 (Sub-No. 22), June 8, 1988 (reported at 4 I.C.C.2d 641) ..... 33a (89-1028)

Decision, *Brotherhood of Railway Carmen v. Interstate Commerce Commission*, D.C. Cir. No. 88-1724, and *American Train Dispatchers' Association v. Interstate Commerce Commission*, D.C. Cir. No. 88-1694, July 25, 1989 (reported at 880 F.2d 562) ..... 1a (89-1027)
1a (89-1028)

Order, *Brotherhood of Railway Carmen v. Interstate Commerce Commission*, D.C. Cir. No. 88-1724, and *American Train Dispatchers' Association v. Interstate Commerce Commission*, D.C. Cir. No. 88-1694, September 29, 1989 (amending decision of July 25, 1989) ..... 27a (89-1027)
27a (89-1028)

Order, *Brotherhood of Railway Carmen v. Interstate Commerce Commission*, D.C. Cir. No. 88-1724, and *American Train Dispatchers' Association v. Interstate Commerce Commission*, D.C. Cir. No. 88-1694, September 29, 1989 (entering judgment) ..... 47a (89-1027)
29a (89-1028)



Order, *Brotherhood of Railway Carmen v. Interstate Commerce Commission*, D.C. Cir. No. 88-1724, and *American Train Dispatchers' Association v. Interstate Commerce Commission*, D.C. Cir. No. 88-1694, September 29, 1989 (denying petitions for rehearing) ..... 49a (89-1027)
30a (89-1028)

Order, *Brotherhood of Railway Carmen v. Interstate Commerce Commission*, D.C. Cir. No. 88-1724, and *American Train Dispatchers' Association v. Interstate Commerce Commission*, D.C. Cir. No. 88-1694, September 29, 1989 (denying suggestions of rehearing *en banc*) ..... 51a (89-1027)
31a (89-1028)

Order, *Brotherhood of Railway Carmen v. Interstate Commerce Commission*, D.C. Cir. No. 88-1724, and *American Train Dispatchers' Association v. Interstate Commerce Commission*, D.C. Cir. No. 88-1694, September 29, 1989 (deferring consideration of ICC petition for rehearing) ..... 53a (89-1027)
32a (89-1028)

## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

*American Train Dispatchers' Association v. ICC, et al.*, No. 88-1694, United States Court of Appeals for the District of Columbia Circuit

09-20-88 Original Proceedings Transferred from the USCA for the Eleventh Circuit.

10-27-88 Petitioner's motion to consolidate cases 88-1694 and 88-1724.

11-25-88 Per Curiam order that the motion to consolidate cases 88-1694 and 88-1724 is denied. The Clerk is directed to schedule these cases for oral argument on the same date and before the same panel. The Clerk is directed to file a copy of this order in both cases. Mikva, Buckley and D. H. Ginsburg, CJs.

04-17-89 Per Curiam order granting intervenors' motion for leave to participate in oral argument. Intervenors shall have 5 of respondent's 15 minutes for argument.

04-25-89 ARGUED before Chief Judge Wald, Edwards and D. H. Ginsburg, CJ's.

07-25-89 Opinion for the Court filed by Circuit Judge D. H. Ginsburg.

07-25-89 ~~Judgment by this Court that the petition for review is granted in part and the case is remanded, in accordance with the Opinion for the Court filed herein this date.~~ Inadvertently entered. See order of 9/29/89.

07-25-89 Mandate order.

09-08-89 INTERVENORS' petition for rehearing and suggestion of rehearing *en banc*.



09-08-89 Petition of Interstate Commerce Commission for rehearing.

09-29-89 Per Curiam order that the opinion of the Court filed July 25, 1989 is amended.

09-29-89 Per Curiam order that the petitions for review are granted in part and the records herein are remanded to the Commission for further proceedings, in accordance with the Opinion of the Court filed herein this date. PMW, HTE, DHG.

09-29-89 Per Curiam order that the Clerk is directed to file petitioners' lodged response to the petition for rehearing. Further ordered that consideration of the petition for rehearing is deferred pending release of the ICC's decision on remand. PMW, HTE, DHG.

09-29-89 Per Curiam order that the suggestion for rehearing *en banc* is denied.

09-29-89 Per Curiam order that the petitions for rehearing are denied. PMW, HTE, DHG.

01-08-90 Notice from the Supreme Court of filing of petition for certiorari.

03-27-90 Letter from Clerk's Office, US Supreme Court, forwarding certified copy of 3/26/90 Supreme Court Order allowing certiorari (S.Ct. No. 89-1027, consolidated with 89-1028). 1 hour allotted for oral argument (DC Cir. Nos. 88-1694 and 88-1724).

03-27-90 Letter from Clerk's Office, US Supreme Court, forwarding certified copy of 3/26/90 Supreme Court Order allowing certiorari (S.Ct. No. 89-1028, consolidated with 89-1027). 1 hour allotted for oral argument (DC Cir. Nos. 88-1694 and 88-1724).

*Brotherhood Railway Carmen v. ICC, et al.*, No. 88-1724, United States Court of Appeals for the District of Columbia Circuit

10-05-88 Original Proceedings Transferred from the USCA for the Eleventh Circuit.

10-27-88 Petitioner's motion to consolidate cases 88-1694 and 88-1724.

11-25-88 Per Curiam order that the motion to consolidate cases 88-1694 and 88-1724 is denied. The Clerk is directed to schedule these cases for oral argument on the same date and before the same panel. The Clerk is directed to file a copy of this order in both cases. Mikva, Buckley and D. H. Ginsburg, CJs.

04-17-89 Per curiam order granting the motion of CSX for leave to participate in oral argument. Intervenor CSX shall have 5 of respondent's 15 minutes for argument.

04-25-89 ARGUED before Chief Judge Wald, Edwards and D. H. Ginsburg, CJ's.

07-25-89 Opinion for the Court filed by Circuit Judge D. H. Ginsburg.

07-25-89 ~~Judgment by this Court that the petition for review is granted in part and the case is remanded, in accordance with the Opinion for the Court filed herein this date.~~ Inadvertently entered. See order of 9/29/89.

07-25-89 Mandate order.

09-08-89 Petition of Intervenor CSX Transportation, Inc. for rehearing and suggestion for rehearing *en banc*.

09-08-89 Petition of Interstate Commerce Commission for rehearing.



09-29-89 Per Curiam order that the opinion of the Court filed July 25, 1989 is amended.

09-29-89 Per Curiam order that the petitions for review are granted in part and the records herein are remanded to the Commission for further proceedings, in accordance with the Opinion of the Court filed herein this date. PMW, HTE, DHG.

09-29-89 Per Curiam order that the Clerk is directed to file petitioners' lodged response to the petition for rehearing. Further ordered that consideration of the petition for rehearing is deferred pending release of the ICC's decision on remand. PMW, HTE, DHG.

09-29-89 Per Curiam order that the suggestion for rehearing *en banc* is denied.

09-29-89 Per Curiam order that the petitions for rehearing are denied. PMW, HTE, DHG.

01-08-90 Notice from the Supreme Court of filing of petition for certiorari.

03-27-90 Letter from Clerk's Office, US Supreme Court, forwarding certified copy of 3/26/90 Supreme Court order allowing certiorari (S.Ct. No. 89-1027, consolidated with 89-1028). 1 hour allotted for oral argument (DC Cir. Nos. 88-1694 and 88-1724).

03-27-90 Letter from Clerk's Office, US Supreme Court, forwarding certified copy of 3/26/90 Supreme Court order allowing certiorari (S.Ct. No. 89-1028, consolidated with 89-1027). 1 hour allotted for oral argument (DC Cir. Nos. 88-1694 and 88-1724).

**Pursuant to Article I Section 4, N.Y. Dock II, Conditions - ICC Finance Docket No. 29430 (366 I.C.C. 171)**

**In the Matter of Arbitration**

**between**

**Norfolk and Western Railway Co.**
**Southern Railway Company**

**and**

**American Train Dispatchers Assn.**

**DECISION AND AWARD**

Appearances

For the Carriers
Jeffrey S. Berlin, Esquire
Richardson, Berlin & Morvillo

William P. Stallsmith, Jr., Esquire
Norfolk Southern Corporation

For the Organization
William G. Mahoney, Esquire
Highsaw & Mahoney, P.C.

**Appointment**

On March 19, 1982, the Interstate Commerce Commission (ICC) approved the application of Norfolk Southern (NS) to obtain control of the separate railroad systems of Norfolk & Western (N&W) and Southern Railroad (Southern) under Finance Docket No. 29430 (Sub.-No. 1). Included in the approval order was the requirement that New York Dock II Conditions apply.

On September 12, 1986, pursuant to New York Dock II conditions and the ICC order, N&W notified the American Train Dispatchers Association (ATDA) that it intended to transfer the work of supervising the locomotive power distribution and assignment from the N&W System Operations Center in Roanoke, Virginia, to Southern's Control Center in Atlanta, Georgia. Thereafter, the parties engaged in negotiations on October 7, 27, 28, and November 10 and 11, 1986, and were unable to reach agreement upon an implementing agreement. Unable to reach agreement upon a neutral referee, on December 4, 1986, N&W requested the National Mediation Board to appoint a neutral and by letter December 9, 1986, Robert O. Harris was nominated to sit as the neutral. The Carriers named R. S. Spenski, Assistant Vice President - Labor relations, as its member of the panel and the Organization designated H. E. Mullinax, Vice President, as its member. On May 13, 1987, the neutral and Carrier members of the panel were informed by R. J. Irvin, President of the American Train Depatchers Association that due to the unavailability of Vice President Mullinax on the scheduled date for an executive session of the panel, "I am appointing Mr. W. G. Mahoney to replace Mr. Mullinax as our member of the arbitration board."



The parties submitted pre-hearing briefs, a hearing was held on February 27, 1987, in Roanoke, Virginia, and the parties then submitted post-hearing briefs. The panel has met twice in executive session and the matter is now ready for decision.

**Background**

The N&W was itself formed as the result of several mergers in the 1960's. ATDA had agreements with each of the railroads which had merged into N&W. The agreements contained scope language which stated that the Assistant Chief Train Dispatcher would "supervise the handling of trains and the distribution of power and equipment incident thereto; and to perform related work." Accordingly, the Assistant Chief Train Dispatchers issued instructions to mechanical department personnel regarding the number and identity of locomotives to be used on trains originating at their respective terminals. ATDA did

not represent Train Dispatchers on the original N&W. Following the merger the N&W "power bureau" assumed responsibility for all of the merger carriers and the ATDA represented dispatchers were no longer assigned the work in question. ATDA appealed this assignment and the Third Division of the National Railroad Adjustment Board issued an award which sustained the position of ATDA. Thereafter, an agreement was reached between N&W and ATDA that the supervisors who worked out of the "power bureau" would be represented by ATDA.

The Southern, which controls its distribution of power out of Atlanta, utilizes Superintendents of Transportation, who are nonagreement officers. It has done so for at least 22 years with such personnel.

**Facts**

After the merger, Norfolk Southern determined to consolidate all of the control functions for the entire system in one location. Mr. J.R. Martin, Senior Assistant Vice President, Transportation Planning, of the Southern testified that Atlanta was chosen and that all of the control functions involved in the movement of cars and the assignment of costs when other railroads utilize NS tracks already have been transferred to the control center there. The only remaining consolidation is the one involved in this dispute, the assignment of locomotive power. Mr. Martin indicated that a single control center would effect efficiencies in the utilization of motive power of about one per cent. With 2,200 locomotives, this would mean 22 less locomotives would be needed, a saving of $26 million in capital investment and a saving of $2 million a year in operating expenses. This does not include savings in labor cost which would be realized. Mr. Martin further testified that because the two systems were operated separately the accounting functions were carried in the same manner as if they were independent companies and locomotives



were only transferred between the railroads in large batches rather than singly.

Mr. H. H. Bradley, Assistant Vice President of Transportation of the Southern, testified that he was in charge of the Control Center in Atlanta. He described the job of Superintendent of Transportation - Locomotive (STL) as follows:

> The STL when he comes on duty would discuss with the off-going STL anything unusual that has occurred during the prior eight hours of an exceptional type nature.
>
> He would then start pulling up his screens on the CRT looking at inventories of locomotives at the major hump yards where the majority of the engines are located. These are electronic hump yards. They look at the inventory and see if there is anything unusual. The STL would know the schedules of the trains for which he has to provide locomotives.
>
> We have an operating plan over the system, and in a normal situation the locomotives cyclicly move from one train to another train to another train and then complete the cycle. And he would have to look for exceptions, if he had a mechanical failure. And then he would have to supply another locomotive.
>
> Then he looks and starts talking with the Chiefs in addition to a tonnage report he has available to see if we have any unusual amount of traffic. He looks to see if there have been any trains annulled that are not to be operated, that have provided extra power, or there may be a problem where there is no power at the end of a normal run, if the train has been canceled.
>
> Looking at these by division, knowing his inventory and knowing the train schedules, he will actually assign locomotives by number into the CRT in many

cases. But that is done generally with discussion with the Shop Foreman who knows which engines have been serviced, which engines are on the fuel rack. He has some of this conversation to make sure that he minimizes his switching.

Mr. Bradley further indicated that at the present time the NS system is operated with two regions—Northern (N&W) and Southern (Southern). When consolidation takes place it will be possible to change this system and there is consideration being given to not only rationalizing the system between North and South—they are now generally divided but there are some anomalies because of the trackage of the two railroads—but also to having the system configured into East and West regions instead. He also indicated that he believes that each of the STL jobs should be interchangeable and that an individual should be able to shift from one region to another.

Mr. Bradley noted that the differences between the STL's and the System Operations Center (SOC) Supervisors are in the tools which the STL uses. Because the STL utilizes the CRT, he has the ability to communicate with other members of the railroad, while the SOC board is an informational system that is available only to the people standing in the SOC.

The pay of STL's is about ten percent higher than that of SOC Supervisors although it cannot be exactly compared because the benefit packages are different and each STL has his salary set by his manager. It may be different from any other STL's salary.

**Contentions of the Parties**

It is the position of the Organization that it has represented the SOC Supervisors who perform power distribution duties on the N&W under an agreement entered into April 1, 1971, and that the transfer of work involved



in this proceeding was not included within the list of jobs which the merged carrier intended to "abolish, create or transfer as a result of ICC approval of its application for joint control" in Finance Docket No. 29430 (Sub.-No. 1). It is the organization's position that the transfer of these jobs is not allowable under the ICC order and that the ICC and this Arbitration Panel have no authority to change wages, rules, or working conditions of employees which are protected by the Railway Labor Act and Section 11347 of the Interstate Commerce Act (49 USC 11347).

It is the Organization's second contention that even if its first contention is not agreed to, the ICC "has never claimed for itself the extraordinary statutory power to eliminate Railway Labor Act and collective bargaining agreement rights of entire classes of employees." It further contends that even if the ICC has such power, it could only be exercised where necessary to effectuate a transaction approved by the ICC and this transaction, the transfer of SOC employees, was never presented to the Commission for approval.

Finally, the Organization contends that this Arbitration Panel, created under the ICC's New York Dock II decision, "explicitly commands preservation of Railway Labor Act and collective bargaining agreement rights. Section 2 of Appendix I states:

> The rates of pay, rules, working conditions, and all collective bargaining and other rights, privileges, and benefits (including continuation of pension rights and benefits) of a railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

The Organization states that even if one were to assume otherwise and also assume that the proposed SOC transfer had been presented to and approved by the ICC, that those

assumptions could not be used as a basis for the elimination of collective bargaining and Railway Labor Act rights because the continued existence of those rights does not subject the proposed SOC transfer "to the risk of nonconsummation as a result of the inability of the parties to agree on a new collective bargaining agreement" as required by the ICC decision in the *Maine Central* decision.

The Carriers contend that the Organization's procedural arguments are without merit. They state that the Arbitration Panel has authority under Section 4 of New York Dock II to fashion an implementing agreement. The Carriers further contend that the argument regarding Section 2 is without merit since recent ICC decisions have refuted the Organization's contention and decisions have been issued by various referees under the authority contained in the ICC decisions. The Carriers also contend that the rearrangement of forces which is the subject of this dispute is an appropriate rearrangement under the authority granted the Carriers by the ICC decision allowing their joint control.

Finally, the Carriers contend that the Implementing Agreement which they proposed is an appropriate basis for this rearrangement of forces.

**Discussion**

**I.**

As noted by the Organization, this is an unusual rearrangement of forces since it combines employees who have chosen to be represented for the purposes of collective bargaining with other employees who are not so represented. However, like all other New York Dock cases, the Panel must first look to its own authority to act.

As noted above, this proceeding is the result of a request by the Carriers in accordance with the ICC decision which allowed joint control of the Carriers. In its decision, the ICC (366 ICC 171, 230) stated:



> We find that the applicants' estimates of employee impact are reasonable. What dislocations there will be appear to be short term. It is possible that further displacement may arise as additional coordinations occur. However, no wholesale disruption of the carriers' work force should occur and the overall disruption is clearly not unusual in comparison to other rail consolidation transactions.

It noted further (366 ICC 171, 231):

> We find that the minimum statutory protection of *New York Dock* is appropriate for the protection of applicants' employees affected by this proceeding without any of the suggested modifications.

The basic questions, then, are whether the type of consolidation desired by the Carriers was authorized by the ICC in its decision and if it was, what are the protections afforded by New York Dock.

The Organization has contended that the consolidation of the Roanoke SOC with the Atlanta Control Center was not part of the original submission of the Carriers in which they listed the expected consolidations which would be made if the joint control was approved by the ICC. The Organization believes that only the actual consolidations specifically approved by the ICC were authorized; any other consolidation is outside the scope of the ICC decision. The language quoted above seems to belie that contention since it specifically states: "It is possible that further displacement may arise as additional coordinations occur." Had the ICC not believed that there would be additional coordinations, beyond those which had been listed in the submissions to it, it would not have needed to put that sentence into its decision. And having put it in, it must have had a reason—the general approval of coordinations which would meet the goal of greater efficiencies upon which the rationale of the decision was based. At the hear-

ing, testimony was received which indicates that there will be a substantial saving to the combined carrier through the planned coordination, both in capital costs since fewer locomotives will be needed and also since operating costs of the remaining locomotives may be reduced through their more efficient utilization throughout the entire system. This Panel concludes that the instant coordination was authorized by the ICC and that the question before the Panel is the application of New York Dock standards to that coordination.

The central issue in this case is the reconciliation of the conflict between Sections 2 and 4 of Appendix I to New York Dock. As noted earlier, Section 2 deals with the right of the employees to continue to enjoy the protection of the Railway Labor Act and any agreements which may have been bargained by the collective bargaining representatives of the affected employees. Section 4, on the other hand, indicates the method by which a carrier may give notice of a change in its operations and the method of resolving disputes which may arise thereafter. This proceeding results from the application of Section 4, and its authority derives from that section.

Prior to 1981, the question of whether a carrier could, through a consolidation of forces, effect changes in rates of pay, rules, or working conditions had never been raised before an arbitrator in a Section 4 proceeding. Between 1981 and 1983 at least five arbitrators ruled that the ICC did not desire that changes of rates of pay, rules, or working conditions, or of representation under the Railway Labor Act occur through arbitration under Section 4 of the New York Dock conditions.[1]

---

[1] *N&W, Illinois Terminal RR. Co.* and *Railroad Yardmasters of America and UTU* (Sickles, 12/10/81); *N&W, Ill. Term. RR. Co.* and *BLE and UTU* (Zumas, 2/1/82); *N&W, Ill. Term. RR. Co.* and *UTU* (Edwards, 2/11/82); *B&O, Newburgh & So. Sh. Ry. Co.* and *BMWE, USW* (Seidenberg, 8/31/83); *B&O, Newb. & S. Sh. Ry. Co.* and *UTU BLE* (Fredenberger, 9/15/83).



On August 23, 1985, the ICC in the *Maine Central Railroad Co.* case (Finance Docket No. 30532) issued a decision in which it discussed the interrelationship of the ICC orders in consolidation cases and the Railway Labor Act. In that decision, the ICC stated:

> In *Southern Control*, the Commission observed that section 6 of the RLA "would seriously impede mergers," if it were not for the protections of WJPA that were essentially incorporated in the Commission's decision. 331 I.C.C. at 171. RLA thus had no independent effect. *Southern Control* was the Commission's response to a Supreme Court directive in *Railway Labor Executives' Association* v. *U.S.*, 379 U.S. 199 (1964), that the Commission clarify the scope of protective conditions imposed in a certain merger. It may be noted that the Court's concern was not with the provisions of RLA or WJPA (except as reflected in the Commission's order), but with the level of employee protection decreed by the Commission in its order. It is that order, not RLA or WJPA, that is to govern employee-management relations in connection with the approved transaction.
>
> Such a result is essential if transactions approved by us are not to be subjected to the risk of nonconsummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transactions. All of our labor protective conditions provide for compulsory binding arbitration to arrive at implementing agreements if the parties are unable to do so, so that approved transactions can ultimately be consummated. Under RLA, however, changes in working conditions are generally classified as major disputes with the results that there is no requirement of binding arbitration. See *REA Express, Inc.* v. *B.R.A.C.*, 459 F.2d 226, 230 (5th Cir. 1972). Since there is no mechanism for insuring that

the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected. Such a result we believe is unacceptable and inconsistent with section 11341 of our act and with Section 7 of the RLA which provides that arbitration awards there under may not diminish or extinguish any of our powers under the Interstate Commerce Act.*

* For the same reason we reject the argument that the provision of our conditions requiring that working conditions not be changed except pursuant to renegotiated collective bargaining agreements reinvigorates the RLA and causes its provisions to supersede the mechanism for resolving disputes associated with negotiating implementing agreements contained in the labor protective conditions we impose on approved transactions.

Prior to, at the time of, and subsequent to this ICC decision, various arbitrators ruled that Section 4 effectively superseded the Section 2 protection contained in New York Dock and that new conditions could be imposed pursuant to such a Section 4 arbitration award.[2] It should be noted that in at least two cases arbitrators who had made earlier decisions regarding the interrelationship between sections 2 and 4 have changed their position.

In the *Union Pacific et al.* and *UTU* case, Arbitrator Brown opens his discussion of the case with the following:

> The jurisdiction of this arbitral committee is derived from the Interstate Commerce Commission, which derives its authority from Congress as set forth in Revised Interstate Commerce Act, 49 U.S.C.A. Secs. 11341(a) and 11347. This committee is a creature of ICC and is chartered to exercise a measure of the

[2] *N&W, et al.* and *UTU* (Ables, 9/25/85); *Union Pacific R.R. et al.* and *UTU* (Brown, 1/85); *C&O, Seaboard System RR.* and *Brotherhood of Railway Carmen* (Marx, 12/15/84); *Union Pacific et al.* and *American Train Dispatchers Association* (Fredenberger, 5/27/84); *BLE* and *Union Pacific et al.* (Seidenberg, 1/17/85)



> authority of ICC in order that final and effective resolution may be had in relation to multi-party disputes which will assuredly rise when employees compete for job assignments and union committees contest for troops and territory.
>
> The authority of this panel is circumscribed not by the Railway Labor Act, but by the mandate of the Interstate Commerce Commission, and, subject to the will of the ICC, we are commissioned to exercise its full authority to achieve a fair and equitable resolution of the dispute before us. The ICC's authority in cases such as that before us is plenary and exclusive.

The panel hearing the instant dispute has exactly the same authority as that noted by Arbitrator Brown, quoted above. Whatever may have been the view prior to the ICC decision in the Maine Central case, it is clear that the ICC believes that its order supersedes the Railway Labor Act protection. While it did not state specifically that the inconsistencies between Sections 2 and 4 of the New York Dock conditions are to be resolved in favor of Section 4, that conclusion is inescapable. Furthermore, as a creature of the ICC, this panel is bound to the ICC view. If that view is incorrect, it is to the courts, not this panel, that the Organization must turn for relief from this newly evolved reconciliation of the conflict between the two sections.

The Organization has raised another point which is worthy of discussion. It states that the ICC cannot take away the collective bargaining rights of the employees involved in the coordination and that the effect of this coordination is exactly to do that. This argument bears analysis. It is clear that if the employees who are moved to Atlanta are consolidated with the present Atlanta employees, the present collective bargaining agreement between N&W and ATDA may not be carried along; however, this does not change the rights of individual employees. Nor does it

eliminate a class of employees, since that class was never recognized through an election under the auspices of the National Mediation Board. If, as the ATDA claims, the Superintendents of Transportation are employees or subordinate officials within the meaning of the Railway Labor Act, they, as individuals, will have the right to petition the National Mediation Board for the selection of a representative for the purposes of collective bargaining. What is lost by the transfer is the incumbency status of the ATDA, a status arrived at through recognition, not through election. The protections afforded by New York Dock are to individual employees, not to their collective bargaining representatives. Whatever rights the ATDA may have under the Railway Labor Act as an "incumbent" bargaining representative are for determination by the National Mediation Board, not this panel. The NMB has exclusive jurisdiction over representation matters. See the Order by Justice O'Connor (A-716) of April 2, 1987 in *Western Airlines, Inc. and Delta Air Lines, Inc.* v. *International Brotherhood of Teamsters and Air Transport Employees*, ___ U.S. ___ (1987). Motion to vacate the stay orders was denied by the full Supreme Court on April 6, 1987.

II.

The Carriers offered a proposed implementing agreement on October 7, 1986. They offered a second proposed implementing agreement on November 11, 1986, and have submitted the latter as the agreement to be found appropriate by this panel.

The original Carrier agreement indicated that the new positions created in the SR Control Center would be offered first to N&W employees currently holding SOC positions in Roanoke. Those positions not filled would then be offered to other qualified N&W employees holding SOC seniority. It further indicated that N&W employees accepting positions would be relocated at the expense of the Carriers. Finally, it indicated that an employee who declines an offer of employment in the SR Control Center may exercise his seniority under applicable rules and agreements.



The second Carrier agreement proposes "NW employees currently holding SOC positions in Roanoke and other NW employees holding SOC seniority will, upon request, be given consideration for employment in the SR Control Center in Atlanta." It will also encompass all protections afforded by New York Dock conditions.

The basic difference in the two agreements is that the first agreement gives the first right to the new positions in Atlanta to SOC employees and the second only allows them to request consideration for employment in that city.

The Organization offered a proposed implementing agreement which would have continued the Organization as the representative of the transferred employees and any employees subsequently hired or promoted to the SR Control Center. It also contained provisions regarding the movement of household goods and the sale of homes of transferred employees

This panel may not change the terms of the New York Dock Conditions. Only the parties may by mutual agreement modify such conditions. Since the first Carrier proposal, that of October 7, 1986, and the Organization proposal both go beyond the terms of an implementing agreement set forth in New York Dock, the second proposed Implementing Agreement of the Carriers, that of November 11, 1986, will be placed in effect.

**Award**

The parties shall adhere to the Implementing Agreement as proposed by the Carriers on November 11, 1986, subject only to the following:

Within a period of 14 days following the date of this Award, the parties shall meet to determine if there are

any mutually agreeable revisions of the November 11, 1986, proposal. If no agreement is reached on any such changes during the above specified 14-day period, the Implementing Agreement shall be as proposed by the Carriers on November 11, 1986.

Robert O. Harris
Chairman and Neutral Member

R.S. Spenski
Carrier Member
[Concur]

W. G. Mahoney
Organization Member
[Dissent]

May 19, 1987

**DISSENT OF ORGANIZATION MEMBER**

I must dissent from the Decision and Award (Decision) dated May 19, 1987, which was drafted by the Chairman and Neutral Member and concurred in by the Carriers' Member.

The Decision sanctions the unilateral transfer of work from Norfolk and Western Railroad SOC Supervisors and Assistant Chief Dispatchers to non-agreement personnel on the Southern Railway. The subject work is exclusively reserved to N&W employees under numerous longstanding agreements between the American Train Dispatchers Association ("ATDA" or "Organization") and the railroads which now constitute the N&W system through merger. N&W employees' exclusive right to this work was confirmed by the National Railroad Adjustment Board, Third Division in Award No. 16556 (ATDA Exhibit No. 1). The transfer of the work creates a major dispute under the Railway Labor Act.

The Decision mischaracterizes the position of the ATDA; it is replete with factual and legal errors; it renders conclusions without attempting to justify them; and, it reaches contradictory conclusions regarding the jurisdiction of the National Mediation Board, for it usurps that jurisdiction by stripping from the SOC Supervisors their representation rights while holding that the National Mediation Board "has exclusive jurisdiction over representation rights" of the ATDA.



Indeed, if this be a valid award, all future arbitrations under Section 4 of the *New York Dock* conditions have been rendered futile for it has laid a foundation upon which the railroads can erect corporate edifices unburdened by rules of law or statutory or contractual provisions; all will be superseded by the "automatic exemption" provisions of Section 11341(a) of the Interstate Commerce Act.

On the issue of the employees' representation rights, the Decision is a gaggle of contradictions and unsupported conclusions. At page 9 the Decision identifies the SOC Supervisors as "employees who have chosen to be represented for the purpose of collective bargaining". At pages 14 and 15, it reaches a contrary conclusion in holding that the employees' loss of their representation rights and their collective bargaining agreement is no loss at all because their right to representation "was never recognized through an election under the auspices of the National Mediation Board." The distinction between "election" and "recognition" in the latter statement is itself contradictory of the historical rulings of the National Mediation Board, including those contained in its very recent decision in *TWA/Ozark Airlines*, 14 N.M.B. 215 (April 10, 1987).

The Decision first concludes at page 15 that the "present collective bargaining agreement [sic] between N&W and ATDA may not be carried along [when the work is transferred to Southern]" but gives no reason for that

conclusion;[1] and, then proceeds to the incredible conclusion, again unsupported, that the employees' loss of their agreements and their statutory representation "does not change the rights of the individual employees." The Decision finally concludes its discussion of the rights of the N&W employees by saying that those employees can, in effect, retrieve the rights they did not lose by petitioning the National Mediation Board for an election after they get to Southern, provided they can demonstrate the Southern work is that of "employees or subordinate officials within the meaning of the Railway Labor Act." (Decision, p. 15.)

The same paragraph concludes that the only loss occasioned by the transfer "is the incumbency status of the ATDA" (Decision, p. 15) and since that is not protected by *New York Dock* it need not be addressed. But if ATDA has any rights as an "incumbent baragaining representative" they "are for determination by the National Mediation Board, not this panel." The Decision, having stripped the N&W employees of their representation and Railway Labor Act rights, then reaches its final, incongruous conclusion that with regard to the Organization "the NMB has exclusive jurisdiction over representation matters."

The Decision errs in its confusion of the several contentions of the Organization and its failure to mention others.

At page 7, the Decision inaccurately characterizes the Organization's position as follows:

> "It further contends that even if the ICC has such power [to eliminate Railway Labor Act and collective bargaining agreement rights of entire classes of employees], it could only be exercised when necessary to effectuate a transaction approved by the ICC and

[1] Perhaps no supporting reason is offered because this conclusion would seem clearly contrary to established law. *BN, Inc.* v. *ARSA*, (7th Cir. 1974) 503 F.2d 58, 63.



> this transaction, the transfer of SOC employees, was never presented to the Commission for approval."

The position of the Organization was, and remains:

1. The ICC has no authority, and therefore a *New York Dock* arbitrator has no authority to extinguish the Railway Labor Act and collective bargaining agreement rights of employees. (ATDA Subm., pp. 12-14, 19-21; ATDA Brief, pp. 1, 7, 9-13.)

2. Even if the ICC might have such rights, it has never claimed the statutory authority to eliminate the Railway Labor Act and collective bargaining rights of entire classes of employees; in this case the entire class of SOC Supervisors on the N&W. (ATDA Subm., pp. 17-19, 21; ATDA Post-Hearing Brief, pp. 1-2, 4.)

3. If such authority existed it could be exercised only if necessary to carry out the transaction approved. (ATDA Subm., p. 19-20; ATDA Brief, p. 2, 5-6, 6 n.3, 7, 14, 17.)

4. The "approved transaction" was fully consummated or "carried out" when NS achieved control of N&W and Southern in 1982, therefore, no exemption authority could now be triggered or activated. (ATDA Subm., p. 18, 20.)

5. If the "approved transaction" was not simply approval of NS control of N&W and Southern but extended to particular changes in operations, services or facilities, the change involving the SOC Supervisors could not have been "approved" because it was never presented to the Commission and, in any event, the Interstate Commerce Act does not provide the I.C.C. with jurisdiction to approve such changes. (ATDA Subm., pp. 14-17, 19; ATDA Brief, pp. 2, 4-5.)

6. The Arbitration Panel and the parties are governed by the orders issued in the *NS Control* case which explicitly preserve the Railway Labor Act and collective bargaining rights of the employees in Section 2 of *New York Dock* and contain no contrary provisions or later orders from which the Organization could have appealed. (ATDA Brief, pp. 2,4,8.)

7. Assuming such authority to exist in the I.C.C. and the arbitrator, such superseding authority could not be exercised unless "necessary" to "carry out the transaction" and the implementing agreement submitted by ATDA demonstrated it was not "necessary" to strip SOC Supervisors of their rights in order to accomplish the transfer desired by NS. (ATDA Subm., pp. 19-20, 21-28; ATDA Brief, pp. 2, 3 nl, 5-6, 6 n3, 7, 14, 14 n7; Transcript of Hearing, pp. 191, 192, 203-204.)

This last argument of ATDA was rejected by the simple device of ignoring it.

Regarding the elimination of employee rights in the face of Section 2 of *New York Dock* which specifically preserves such rights and in the absence of any language in the orders governing the *NS control* case to indicate otherwise, the Decision concludes at page 11 that the "central issue in this case is the reconciliation of the conflict between Sections 2 and 4 of Appendix [sic] I to New York Dock." It then finds, after quoting extensively from the Commission's 1985 *Maine Central* decision and an arbitration decision reached thereafter, that Section 2 is now wholly meaningless. (See, Decision, p. 14.)

The Decision quotes from a 1985 decision of an Arbitrator Brown in which he states that arbitrators under *New York Dock* "are commissioned to exercise . . . [the] full authority [of the ICC] to achieve a *fair and equitable*



solution of the dispute before us",[2] but then reaches a result which is clearly unfair and inequitable. The Decision justifies this result by engaging in hypertechnical reasoning which defies even a cursory scrutiny. For example, the Decision determines that the employees have lost no rights because their representation on N&W resulted from "recognition, not election" and their "present collective bargaining agreement [sic] [which] . . . may not be carried along," involve rights of the Organization and not the individual employees. Another example is the Decision's conclusion that ATDA's proposed implementing agreement and the first of the two proposals submitted by NS have gone "beyond the terms of the New York Dock Conditions" presumably because they would give "the first right to the new positions in Atlanta to SOC employees".[3] Therefore, the Decision would impose the Carriers' second proposed implementing agreement which "only allows them [SOC Supervisors] to request consideration for employment in that city [of Atlanta]". (Decision, pp. 16-17.)

Article I, Section 4 of *New York Dock requires* the "transaction . . . [to] provide for the *selection of forces from all employees involved* on a basis accepted as appropriate . . . and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4." (Emphasis supplied.) Section 9 of *New York Dock requires* the carrier to pay the affected employee's moving expenses. There is nothing in *New York Dock*, any decision of the Commission, or any arbitration decision prior to this one which holds an arbitrator cannot impose a "fair and equitable" agreement or that he must accept a provision which vio-

---

[2] Emphasis supplied. See also ATDA Brief, pp. 15-19 for analysis of authorities on "fair and equitable" requirements.

[3] No reason was given as to how the ATDA proposal exceeded *New York Dock* limitations.

lates Section 4 by merely "considering" employees for work taken from them. (Decision, p. 16.)

If one compares the explicit, simple English in which Sections 4 and 9 are couched with the statements on pages 16 and 17 of the Decision and follows that comparison with a review of the entire Decision and the record in this case, one is compelled to conclude that the Decision has fallen victim to egregious errors and would visit the bitter consequences of those errors only upon the N&W employees.

WM. G. MAHONEY
Organization Member of Arbitration Panel

May 19, 1987



**ATTACHMENT "A"**

**(Revised November 20, 1986)**

**IMPLEMENTING AGREEMENT**

**BETWEEN**

**NORFOLK AND WESTERN RAILWAY COMPANY**
**SOUTHERN RAILWAY COMPANY**

**AND NORFOLK AND WESTERN EMPLOYEES**

**REPRESENTED BY**

**THE AMERICAN TRAIN DISPATCHERS ASSOCIATION**

WHEREAS, Norfolk and Western Railway Company and Southern Railway Company have filed applications with the Interstate Commerce Commission ("ICC") in Finance Docket No. 29430 and related sub-dockets 1 through 6 ("FD 29430") seeking approval of the acquisition by Norfolk Southern Corporation ("NSC") (formerly NWS Enterprises, Inc.) of control of Norfolk and Western Railway Company and its carrier subsidiaries ("NW") and of Southern Railway Company and its carrier subsidiaries ("SR") and coordination of operations of NW and SR; and

WHEREAS, the ICC has approved the aforesaid Finance Docket and has imposed the employee protection conditions set forth in New York Dock Ry.—Control—Brooklyn Eastern District Terminal, 354 ICC 399 (1978), as modified at 360 ICC 60 (1970) ("New York Dock Conditions"), therein; and

WHEREAS, the Carriers have served notice on September 15, 1986 of their intention to coordinate certain NW work performed by NW employees in the System Operations Control (SOC) in Roanoke, Virginia into the SR Control Center in Atlanta, Georgia on or about December 15, 1986; and

WHEREAS, the parties signatory hereto desire to reach an implementing agreement consistent with Article I, Sec-

tion 4 of the New York Dock Conditions with respect to the transaction described in this agreement;

NOW, THEREFORE, IT IS AGREED, among NW, SR ("Carriers") and the American Train Dispatchers Association ("ATDA"), as follows:

***ARTICLE I***

***Section 1***

Effective fifteen (15) days after notice is given to NW employees in SOC, located in Roanoke, Virginia, with a copy to the General Chairman, the work performed by NW employees in SOC shall be coordinated into the SR Control Center in Atlanta, Georgia, as described in Attachment 1 to this Agreement.

***Section 2***

The notice provided for under Section 1 hereof will list the names, seniority dates and rates of pay of the regular occupants of the positions in SOC, Roanoke, to be abolished, and the positions to be established in the SR Control Center in Atlanta.

***Section 3***

Nothing in this agreement prevents the positions to be established in the SR Control Center in Atlanta from being established on the same terms and conditions as apply to other comparable positions in existence in the SR Control Center prior to the effective date of this Agreement.

***Section 4***

NW employees currently holding SOC positions in Roanoke and other NW employees holding SOC seniority will, upon request, be given consideration for employment in the SR Control Center in Atlanta.



***ARTICLE II***

***Section 1***

Any employee adversely affected by this transaction will be afforded the protective benefits prescribed by the New York Dock Conditions.

***Section 2***

An employee eligible for benefits under the New York Dock Conditions as a result of this transaction must file a claim therefor in writing with the officer(s) designated by the Carrier(s) within sixty (60) days following the end of the month for which a claim is filed on the claim form provided by the Carrier(s).

***Section 3***

Protective benefits shall cease prior to the expiration of the employee's protective period in the event of the employee's resignation, death, retirement, termination for justifiable cause, or failure to return to service upon recall.

***ARTICLE III***

This agreement shall become effective as of the date executed and constitutes the Implementing Agreement fulfilling the requirements of Article I, Section 4, stipulated in the New York Dock Conditions. Where rules, other agreements and practices conflict with this agreement, the provisions of this agreement shall apply.

Signed at Roanoke, Virginia this 11th day of November, 1986.

| FOR THE AMERICAN TRAIN DISPATCHERS ASSOCIATION: | FOR NORFOLK AND WESTERN RAILWAY COMPANY: |
|---|---|
| General Chairman | Assistant Vice President Labor Relations |
| Approved: | FOR SOUTHERN RAILWAY COMPANY: |
| Vice President | Assistant Vice President Labor Relations |

3/T-00871/rss



**INTERSTATE COMMERCE COMMISSION**

**DECISION**

**Finance Docket No. 29430 (Sub-No. 20)**

**NORFOLK SOUTHERN CORPORATION—CONTROL—NORFOLK AND WESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY**

**Decided: June 5, 1987**

On May 29, 1987, the American Train Dispatchers Association (ATDA) filed a petition for stay pending the Commission's review of the arbitration award in the matter of *Norfolk and Western Railway Company, Southern Railway Company, and American Train Dispatchers Association*, Award of Referee Harris, May 19, 1987.[1] Norfolk and Western Railway Company (N&W) and Southern Railway Company (Southern) filed a reply.

The arbitration process was invoked under the provisions of the employee protective conditions we imposed in connection with our approval of the acquisition of control by Norfolk Southern Corporation (NS) of N&W and Southern in *Norfolk Southern Corp.—Control—Norfolk & W. Ry. Co.*, 366 I.C.C. 173 (1982) (*Norfolk Southern Control*). The employee protective conditions imposed in that proceeding are those set forth in *New York Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*).

At issue here is NS's coordination of the locomotive power distribution of N&W and Southern. NS will transfer N&W's locomotive power distribution supervisors, who are represented by ATDA, from N&W's Systems Operating Center at Roanoke, VA, to Southern's Control Center in Atlanta, GA, where they will work with Southern's power

[1] ATDA also filed a petition for review of the arbitration award. That petition will be considered in a subsequent decision.

distribution supervisors, who have historically been considered management and not subject to a collective bargaining agreement. The arbitration award imposed an implementing agreement to effectuate this coordination of forces.

The Commission's authority to review arbitration awards was recently asserted in *Chicago and North Western Transportation Company—Abandonment—Near Dubuque and Oelwein, IA*, ___ I.C.C. 2d ___ (1987) (*Oelwein*).[2] Pending our review of the arbitration award, we have been asked to stay the award's effectiveness. Assuming we have the authority to stay an arbitration award pending our review, although we are not so deciding that issue here, we conclude that a stay would not be justified.

In determining whether petitioner has demonstrated entitlement to a stay, we refer to the four factors identified in *Washington Metropolitan Area Transit Comm.* v. *Holiday Tours, Inc.*, 559 F.2d 1841 (D.C. Cir. 1977):

(1) that there is a strong likelihood that the movant will prevail on the merits;

(2) that the movant will suffer irreparable harm in the absence of a stay;

(3) that other interested parties will not be substantially harmed; and

(4) that the public interest supports the granting of the stay.

Petitioner's showing under the last three factors is unpersuasive, and its contention that it will likely prevail on the merits is at best arguable.

---

[2] ATDA contends that arbitration awards under the *New York Dock* conditions are reviewable in the courts and that the Commission can participate in such disputes solely through court referral. In light of *Oelwein*, ATDA submitted its petition for stay to the Commission, but it states that it does so without prejudicing its right to judicial review.



In regard to prevailing on the merits, ATDA raises jurisdictional questions and a substantive question about the terms and conditions of the implementing agreement accepted by the arbitration panel. First, as to the jurisdictional issues, ATDA argues that: (1) the transfer of locomotive distribution functions from Roanoke to Atlanta was in violation of the Railway Labor Act (RLA), and the arbitration panel's authorization of the transfer was in excess of its jurisdiction; and (2) the Commission's approval of NS's control of N&W and Southern did not exempt the carriers from the RLA in regard to the subject transfer because (a) the coordination of locomotive distribution is not a transaction subject to approval by the Commission, and (b) the transfer was not specifically mentioned in the Commission's authorization in *Norfolk Southern Control*.

Petitioner has not shown that it is likely to prevail on its jurisdictional arguments. The arbitration panel's jurisdiction over the transfer stems from the Commission's jurisdiction over the transaction. The transfer is not subject to the RLA because the Commission, in *Norfolk Southern Control*, authorized the coordination of N&W and Southern under NS, subject to *New York Dock*. The mandatory arbitration provisions of *New York Dock* take precedence over the RLA dispute resolution procedures in transactions approved by this Commission. See Finance Docket No. 30532, *Maine Central Railroad Company, Georgia Pacific Corporation, Canadian Pacific Ltd. and Springfield Terminal Company—Exemption from 49 U.S.C. 11342 and 11343* (not printed), served September 13, 1985. The proposed transfer, although not specifically mentioned in *Norfolk Southern Control*, is one of the future coordinations expected to flow from, and is therefore part of, the control transaction that we approved. Indeed, the coordination of locomotive power is precisely the type of action that might reasonably be expected to flow from the control transaction. *See* arbitration decision, pp. 10-11. The

arbitration panel, citing *Maine Central*, correctly exercised its jurisdiction over the dispute arising from the transfer.

Second, ATDA argues that the arbitration panel made a substantive error in accepting verbatim the terms and conditions of an implementing agreement proposed by the carriers. ATDA had proposed that the *New York Dock* conditions be imposed along with certain other conditions. Furthermore, at first the carriers had also proposed expanding the *New York Dock* protections with additional conditions. However, the carriers' later proposal included only *New York Dock* conditions. The arbitration panel found that it was not authorized to "change the terms of the *New York Dock* conditions" and placed into effect the later proposed implementing agreement of the carriers since the other two proposals "go beyond the terms of an implementing agreement set forth in *New York Dock*." This raises an interesting, and perhaps significant, issue concerning the authority of the arbitration panel to set the terms and conditions of the implementing agreement. We cannot determine at this time, however, whether petitioner's position on this issue will likely prevail. Even if we were to assume that it would, we still conclude that the other stay factors do not weigh in favor of granting a stay.

Petitioner has not demonstrated that in the absence of a stay it will suffer irreparable harm. ATDA argues that its members who are affected by the transfer will be irreparably harmed because they will be compelled to move from Roanoke to Atlanta, that those employees who transfer will lose the protections of their collective bargaining agreements while the petition for review is pending, and that those employees who choose not to transfer will, by exercising their seniority rights, displace other employees.

ATDA's arguments are not persuasive. The potential harm that they foresee is not irreparable. If employees were to suffer monetary damage attributable to the move,



petitioner has not shown why it is not possible for those employees to be adequately compensated under the *New York Dock* conditions. Since employees transferred to Atlanta will have an opportunity to obtain representation, it has not been shown that the employees will be foreclosed from receiving protections under a new collective bargaining agreement. Furthermore, N&W and Southern have indicated that the involved employees (except for one retiring employee) have elected to transfer to Atlanta and thus no employee displacement will occur.

As to harm to other parties, the record shows that N&W and Southern will realize a $26 million capital investment saving and an annual $2 million operating expense saving, exclusive of labor cost savings, from the coordination. To stay the transfer would delay the coordination and thereby prevent the carriers from realizing these savings. In addition, the carriers indicate that they, as well as numerous N&W management employees have made certain preparations in expectation of the transfer and that additional costs would be incurred should the transfer be delayed. The N&W management employees have sold their homes or terminated their leases in Roanoke and purchased new homes or entered into leases in Atlanta. Additional costs would have to be incurred for the N&W management employees to retain residences in Roanoke. The carriers have installed computer and telephone equipment in Atlanta; if they are unable to effectuate the transfer on June 6, 1987, the carriers will incur additional computer and telephone costs to relay distribution information to Roanoke.

Petitioner has also failed to show that the public interest favors a stay. The Commission, in *Norfolk Southern Control*, has found that coordination of the carriers is in the public interest. The economies to be realized by this coordination will benefit the carriers and the shipping public. To stay the transfer would delay these economies that have already been shown to be in the public interest.

This decision will not significantly affect the quality of the human environment or energy conservation.

*It is ordered*:

1. The petition for stay is denied.

2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Commissioner Sterrett did not participate.

Noreta R. McGee
Secretary

(SEAL)



**INTERSTATE COMMERCE COMMISSION**

**DECISION**

**Finance Docket No. 28905 (Sub-No. 22)**

**CSX CORPORATION—CONTROL—CHESSIE SYSTEM, INC. AND SEABOARD COAST LINE INDUSTRIES, INC.**

**Finance Docket No. 21215**

**SEABOARD AIR LINE R.R. CO.—MERGER—ATLANTIC COAST LINE R.R. CO.**

**Decided: June 5, 1987**

On May 29, 1987, the Brotherhood Railway Carmen (BRC), Division of Brotherhood of Railway & Airline Clerks, filed an emergency motion to dismiss as moot the petition filed April 13, 1987, by CSX Transportation, Inc., (CSX) and The Chesapeake and Ohio Railway Company (C&O) for administrative review of an Arbitration Committee opinion and award.[1] BRC has also petitioned the Commission to order CSX to cease and desist from its proposal to implement on June 8, 1987, the coordination permitted by the Arbitration Committee determination. CSX and C&O jointly filed a reply in opposition to the petition for a cease and desist order.

The Arbitration Committee was convened pursuant to section 4 of the *New York Dock* conditions (*New York Dock Ry.- Control -Brooklyn East. Dist.*, 360 I.C.C. 60 (1979)), imposed by this Commission in *CSX—Control*, 363 I.C.C. 521 (1980) and section 4 of a November 3, 1966 merger protective implementing agreement (Orange Book agreement) between certain predecessors of CSX, the former Seaboard Air Line Railroad Company and the Atlantic Coast Line Railroad Company and various labor unions including BRC. In an opinion and award dated March 23,

---

[1] BRC has also sought review of the Arbitration Committee opinion and award in a cross-complaint.

1987, the Arbitration Committee directed the parties to adopt an implementing agreement governing the proposed consolidation of CSX's freight car heavy repair facilities at Waycross, GA and Raceland, KY. Under the implementing agreement imposed by the Arbitration Committee, the Waycross facility would be closed and its work transferred to Raceland. However, employees entitled to the benefits of the Orange Book agreement could not be compelled to transfer to Raceland.

The carriers have petitioned this Commission to reverse that aspect of the Arbitration Committee award which prohibited them from requiring Orange Book protected employees to transfer from Waycross to Raceland. Nevertheless, on May 14, 1987, CSX formally advised BRC that the implementing agreement imposed by the arbitration award of March 23, 1987, would become effective on May 26, 1986, and that the anticipated date for implementing the coordination was June 8, 1987. BRC is concerned that employees exercising their Orange Book rights could be deprived of their jobs as well as their protection should the carriers be allowed to implement the arbitration award while, at the same time, continuing their efforts to reverse a part of it. BRC notes that should the carriers be successful in reversing the employee Orange Book rights recognized in the Arbitration award, affected Orange Book employees would have no opportunity to bid for Raceland jobs. As a result of the implementation of the coordination, employees junior to the Orange Book employees could be expected to fill the available positions at Raceland.

Without necessarily deciding whether we have the authority to issue a cease and desist order in the present situation, but assuming we have that authority, we conclude that there is insufficient reason for the issuance of such an order in this matter. In deciding whether a cease and desist order is justified we will use the criteria for reviewing stay requests as set forth in *Washington Metropolitan Area Transit Comm'n.* v. *Holiday Tours, Inc.*,



559 F.2d 841 (D.C. Cir. 1977). Even if the position of BRC should ultimately prevail in this proceeding, BRC has not shown that either Orange Book employees or non-Orange Book employees will be irreparably injured absent a stay. The Orange Book employees currently working at Waycross may remain at their present location in a fully protected status.[2] If they elect to move to Raceland and the BRC prevails, they will return to Waycross without loss of seniority rights. Arrangement can be made for reimbursement of any expenses the employees incur in those movements. Non-Orange Book employees may move to Raceland and, if the BRC prevails, may return to Waycross and be restored to their former status, and arrangements can be made to reimburse those employees for any expenses they incur. Non-Orange Book employees who remain in Waycross will not be discharged, and may exercise their seniority rights to bid on the non-heavy repair work that will remain at Waycross. As the carriers concede, this Commission can make the non-Orange Book employees whole for any monetary losses they would suffer if BRC prevails.

In contrast, granting the cease and desist order would harm the carriers because they would be precluded from realizing the efficiencies that consolidation of the two repair facilities would produce.

BRC has also not demonstrated that it will likely prevail before the Commission in this proceeding. BRC has also failed to show that the public interest favors a stay. The Commission, in its decisions authorizing the acquisitions of control in F.D. No. 28905 and F.D. No. 21215, found that coordination of the carriers is in the public interest. The economies realized by this coordination will benefit the carriers and the shipping public. To stay the transfer would

---

[2] Indeed, in their reply, the carriers indicate that they will hold open a sufficient number of positions at Raceland to accommodate Orange Book employees.

delay these economies that have already been shown to be in the public interest.

It is not necessary now to deal with the motion to dismiss and therefore we will hold it under advisement.

This action will not significantly affect the quality of the human environment or energy conservation.

*It is ordered*:

1. The motion to dismiss the petition for administrative review of the Arbitration Committee opinion and award is held under advisement.

2. The petition to order CSX to cease and desist from implementing the described coordination is denied.

3. This decision is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Commissioner Sterrett did not participate.

Noreta R. McGee
Secretary

(SEAL)



**SUPREME COURT OF THE UNITED STATES**
**OFFICE OF THE CLERK**
**WASHINGTON, D.C. 20543**

March 26, 1990

Mr. Jeffrey S. Berlin
2300 N Street, N.W.
Suite 625
Washington, DC 20037

Re: Norfolk and Western Railway Company, et al.
v. American Train Dispatchers Association, et al.,
No. 89-1027
CSX Transportation, Inc.
v. Brotherhood of Railway Carmen, et al.
No. 89-1028

Dear Mr. Berlin:

The Court today entered the following order in each of the above entitled cases:

The petition for a writ of certiorari is granted.

The cases are consolidated and a total of one hour is allotted for oral argument.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

(9)

Supreme Court, U.S.
FILED
MAY 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1028

In The

# Supreme Court of the United States

October Term, 1989

CSX TRANSPORTATION, INC.,

*Petitioner,*

v.

BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,

*Respondents.*

## BRIEF FOR THE PETITIONER

James S. Whitehead
(Counsel of Record)
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703

Nicholas S. Yovanovic
James D. Tomola
CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202

*Attorneys for Petitioner*
*CSX Transportation, Inc.*

Date: May 25, 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

Does § 11341(a) of the Interstate Commerce Act empower the Interstate Commerce Commission to override a provision of a collective bargaining agreement where necessary to do so in order to prevent a rail consolidation found by the Commission to be in the public interest from being obstructed by such agreement?

## LIST OF PARTIES AND RULE 29.1 LIST

The parties before the court of appeals and this Court are all listed in the caption.[1]

CSX Transportation, Inc. ("CSXT") is a wholly-owned subsidiary of CSX Corporation ("CSX"). The subsidiaries and affiliates of CSXT or CSX, other than those wholly owned by them, are:

The Akron Union Passenger Depot Company;
Allegheny and Western Railway Company;
Augusta and Summerville Railroad Company;
The Baltimore and Cumberland Valley Railroad Extension Company;
Beaver Street Tower Company;
Central Transfer Railway and Storage Company;
Chatham Terminal Company;
Clearfield and Mahoning Railway Company;
Dayton and Michigan Railroad Company;
The Home Avenue Railroad Company;
The Lakefront Dock and Railroad Terminal Company;
Mid-Allegheny Corporation;
North Charleston Terminal Company;
Richmond-Washington Company, which has a subsidiary, RF&P Corporation;
Winston-Salem Southbound Railway Company;
Woodstock & Blockton Railway Company

---

[1] This case has been consolidated with No. 89-1027, *Norfolk & W. Ry. v. American Train Dispatchers Ass'n*. The parties in No. 89-1027 are petitioners, Norfolk and Western Railway Co. and Southern Railway Co., and respondents, American Train Dispatchers Association, Interstate Commerce Commission, and the United States of America.



## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| LIST OF PARTIES AND RULE 29.1 LIST | ii |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTES INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| I. The Statutory Framework | 3 |
| II. The Creation of the Consolidated CSX Rail System | 6 |
| III. Shop Consolidations and Operational Coordinations on the Consolidated CSX System | 8 |
| IV. The Waycross-Raceland Shop Consolidation and the Arbitration Award | 9 |
| V. The Commission's Ruling on Appeal | 11 |
| VI. The Court of Appeals' Decision | 12 |
| SUMMARY OF ARGUMENT | 14 |
| ARGUMENT | 15 |
| I. The Court of Appeals' Decision, Interpreting the ICA Immunity Provisions, Is Contrary to Prior Decisions of this Court | 15 |

TABLE OF CONTENTS – Continued

Page

II. The Plain Terms of § 11341(a) Immunize Rail Carriers from Obligations in Collective Bargaining Agreements that Impede an ICC-Approved Rail Consolidation ..... 21

III. The Legislative History of the ICA's Immunity Provisions Establishes that Congress Intended to Encompass Obligations Arising from Rail Collective Bargaining Agreements ..... 29

A. The Transportation Act of 1920 ..... 30

B. The Railway Labor Act ..... 33

C. Unsuccessful Efforts to Amend the ICA (1928-1930) ..... 35

D. The Emergency Railroad Transportation Act of 1933 ..... 39

E. The Transportation Act of 1940 ..... 43

IV. The Court of Appeals' Decision Will Frustrate the Achievement of the National Transportation Policy of Fostering and Encouraging Rail Consolidations ..... 46

CONCLUSION ..... 50

APPENDIX ..... 1a



TABLE OF AUTHORITIES

Page

CASES

*Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899) ..... 18, 22

*Altman v. Central of Georgia Ry.*, 488 F.2d 1302 (D.C. Cir. 1973) ..... 18

*American Airlines v. CAB*, 445 F.2d 891 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972) ..... 28

*Andrews v. Louisville & N. R.R.*, 406 U.S. 320 (1972) ..... 25

*Barrows v. Jackson*, 346 U.S. 249 (1953) ..... 24

*Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361 (1986) ..... 21

*Brandywine Valley R.R. – Purchase – CSX Transp., Lines in Florida*, 5 I.C.C. 2d 764 (1989) ..... 29

*Brotherhood of Loc. Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986). ..... 27

*Brotherhood of Loc. Eng'rs v. Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963) ..... 26, 48

*Brotherhood of Loc. Eng'rs v. ICC*, 761 F.2d 714 (D.C. Cir. 1985) ..... 10, 20

*Brotherhood of Loc. Eng'rs v. ICC*, 885 F.2d 446 (8th Cir. 1989) ..... 28

*Brotherhood of Maint. of Way Employes v. United States*, 366 U.S. 169 (1961) ..... 47

*Brotherhood of Ry. Carmen v. ICC*, 880 F.2d 562 (D.C. Cir. 1989) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

*Brotherhood of Ry. Clerks v. Florida E. C. R.R.*, 384 U.S. 238 (1966) ..... 5

*Bundy v. Penn Cent. Co.*, 455 F.2d 277 (6th Cir. 1972) ..... 27

*Burlington N., Inc. v. American Ry. Supervisors Ass'n*, 503 F.2d 58 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975) ..... 26

*Burlington N. R.R. v. Brotherhood of Maint. of Way Employees*, 481 U.S. 429 (1987) ..... 5

*Burlington N. R.R. v. United Transp. Union*, 848 F.2d 856 (8th Cir.), *cert. denied*, 109 S. Ct. 1130 (1988) .... 27

*CSX Corp. – Control – Chessie Sys. & Seaboard Coast Line Indus.*, 363 I.C.C. 521 (1980).....6, 7, 8, 12

*CSX Corp. – Control – Chessie Sys. & Seaboard Coast Line Indus.*, 4 I.C.C. 2d 641 (1988)..... 1, 12, 13, 21

*California v. Taylor*, 353 U.S. 553 (1957) ..... 25

*Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) .21, 29

*Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570 (1971) ..... 5, 25, 33, 38

*Chicago, R.I. & G. Ry. Trustees Lease*, 230 I.C.C. 181 (1938) ..... 19

*City of Palestine, Texas v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978) .18, 28

*Colorado v. United States*, 271 U.S. 153 (1926) ..... 17

*Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986) ..... 18



TABLE OF AUTHORITIES – Continued

Page

*Consolidation of R.R.'s*, 185 I.C.C. 403 (1932) .....38, 42

*County of Marin v. United States*, 356 U.S. 412 (1958) ..... 47

*Denver & R. G. W. R.R. – Trackage Rights – Missouri Pac. R.R. Between Pueblo, CO and Kansas City, MO*, ICC Dec. Finance Doc. No. 30,000 (Sub-No. 18), *vacated and remanded sub nom. Brotherhood of Loc. Eng'rs v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *vacated*, 482 U.S. 270 (1987) .....10, 28

*Detroit & T. S. L. R.R. v. United Transp. Union*, 396 U.S. 142 (1969) .....5, 25

*Elgin J. & E. R.R. v. Burley*, 325 U.S. 711 (1945) ..... 5

*Escanaba & L. S. R.R. v. United States*, 303 U.S. 315 (1938) ..... 16

*Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945) ..... 4

*Gulf, M. & O. R.R. – Abandonment*, 282 I.C.C. 311 (1952) ..... 28

*Hurd v. Hodge*, 334 U.S. 24 (1948) ..... 24

*ICC v. Brotherhood of Loc. Eng'rs*, 482 U.S. 270 (1987) .....20, 23

*International Ass'n of Machinists v. Central Airlines*, 372 U.S. 682 (1963) .....25, 32

*International Ass'n of Machinists v. Northeast Airlines, Inc.*, 473 F.2d 549 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972) ..... 28

*International Ass'n of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976) ..... 28

TABLE OF AUTHORITIES – Continued

Page

*International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961) ..... 32, 33, 34

*K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988) ..... 21

*Kent v. CAB*, 204 F.2d 263 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953) ..... 26, 28

*Kesinger v. Universal Airlines, Inc.*, 474 F.2d 1127 (6th Cir. 1973) ..... 28

*Louisville & N. R.R. v. Mottley*, 219 U.S. 467 (1911) .18, 31

*Maine Central R.R. – Exemption from 49 U.S.C. 11342 and 11343*, ICC Dec. Finance Doc. No. 30,532 (served Sept. 16, 1985), *aff'd mem. sub nom. Railway Labor Exec's' Ass'n v. ICC*, 812 F.2d 1443 (D.C. Cir. 1987) ..... 10, 28

*McLean Trucking Co. v. United States*, 321 U.S. 67 (1944) ..... 4

*Mississippi River Fuel Corp. v. Slayton*, 359 F.2d 106 (8th Cir. 1966), *rev'd on other grounds sub nom. Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162 (1967) ..... 18

*Missouri P. R.R. – Merger – Texas & P. Ry.*, 348 I.C.C. 414 (1976), *rev'd sub nom. City of Palestine, Texas v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978) ..... 28

*Missouri Pac. R.R. v. United Transp. Union*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987) ..... 27

*NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) ..... 32

*Nemitz v. Norfolk & W. Ry.*, 436 F.2d 841 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971) ..... 27, 44



TABLE OF AUTHORITIES – Continued

Page

*New York Dock Ry. – Control – Brooklyn E. Dist. Term.*, 360 I.C.C. 60 (1979), *aff'd sub nom., New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979) ..... *passim*

*New York v. United States*, 257 U.S. 591 (1922) ..... 17, 18

*Norfolk & W. Ry. – Merger*, 347 I.C.C. 506 (1974) ..... 28

*Norman v. Baltimore & O. R.R.*, 294 U.S. 240 (1935) ..... 18

*Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956) ..... 24, 25, 34

*Railway Labor Exec's' Ass'n v. Guilford Transp. Indus., Inc.*, 667 F. Supp. 29 (D. Me. 1987), *aff'd per curiam*, 843 F.2d 1383 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 3213 (1989) ..... 27

*Railway Labor Exec's' Ass'n v. ICC*, 883 F.2d 1079 (D.C. Cir. 1989) ..... 28

*Railway Labor Exec's' Ass'n v. United States*, 339 U.S. 142 (1950) ..... 19, 44, 49

*SEC v. Central-Illinois Sec. Corp.*, 338 U.S. 96 (1949) ..... 16

*Schwabacher v. United States*, 334 U.S. 182 (1948) ..... 14, 15, 16, 17, 18, 47

*Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118 (1948) ..... 47

*Shelley v. Kraemer*, 334 U.S. 1 (1948) ..... 24

*Southern Pac. Transp. Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985) ..... 22

TABLE OF AUTHORITIES – Continued

Page

*St. Paul Bridge & Term. Ry. Control*, 199 I.C.C. 588 (1934) ..... 42

*Texas & N.O. R.R. v. Brotherhood of Ry. Clerks*, 281 U.S. 548 (1930) .....33, 34

*Texas v. United States*, 292 U.S. 522 (1934).... 17, 22, 42, 47

*Trailer Marine Trans. Corp. v. FMC*, 602 F.2d 379 (D.C. Cir. 1979)..... 23

*United States v. Lowden*, 308 U.S. 225 (1939) ..14, 19, 47

*United Transp. Union v. Norfolk & W. Ry.*, 332 F. Supp. 1170 (N.D. Ohio 1971) ..... 27

*Warren v. United States*, 340 U.S. 523 (1951)..... 23

STATUTES AND RULES

Emergency Railroad Transportation Act of 1933, ch. 91, 48 Stat. 211 .....2, 22, 30, 32, 39

Title I, § 7(e), 48 Stat. 214 ..... 41

Title I, § 10(a), 48 Stat. 215 .....41, 43

Title I, § 11, 48 Stat. 215..... 41

Title II, § 202, 48 Stat. 217-19 ..... 22

Fed. R. App. P. 15(d) ..... 12

Interstate Commerce Act

Ch. 113, 49 U.S.C. § 11301-11367 (1982) .....3, 45

§ 5(2)(f) ..... 45



TABLE OF AUTHORITIES – Continued

Page

§ 5(6)(c) ..... 24

§ 5(8) ..... *passim*

§ 5(11) ..... 16, 29, 43

§ 5(15) ..... 41

§ 11341(a), 49 U.S.C. § 11341(a) (1982) ..... *passim*

§ 11343, 49 U.S.C. § 11343 (1982) ..... 6

§ 11343(a)(3), (4), (5), 49 U.S.C. § 11343(a)(3), (4), (5) (1982)..... 3

§ 11344(b)(1), 49 U.S.C. § 11344(b)(1) (1982) .....4, 49

§ 11344(b)(1)(D), 49 U.S.C. § 11344(b)(1)(D) (1982) .....3, 6

§ 11344(c), 49 U.S.C. § 11344(c) (1982).....3, 6

§ 11347, 49 U.S.C. § 11347 (1982) ..... 4, 13, 27, 45

Pacific Railroad Acts, 45 U.S.C. § 83 (1982) ..... 22

Pub. L. No. 95-473, § 3(a), 92 Stat. 1466..... 23

Rail Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31..... 47

Railway Labor Act, ch. 347, 44 Stat. 577-87, 45 U.S.C. §§ 151-188 (1982) .....5, 25, 33

§ 2 First, 45 U.S.C. § 152 First (1982) ..... 25

§ 2 Seventh, 45 U.S.C. § 152 Seventh (1982)..... 25

§ 5, 45 U.S.C. § 155 (1982)..... 5

TABLE OF AUTHORITIES – Continued

Page

§ 5 First, 45 U.S.C. § 155 First (1982) ..... 5

§ 6, 45 U.S.C. § 156 (1982)..... 5

§ 7, 45 U.S.C. § 157 (1982)..... 5

§ 7 First, 45 U.S.C. § 157 First (1982) ..... 5

Transportation Act of 1920, ch. 91, 41 Stat. 456 ..... 22, 30, 33, 35

Title III, §§ 300-16, 41 Stat. 469-74 ..... 32

Title IV, § 407, 41 Stat. 480 .....2, 32

Transportation Act of 1940, ch. 722, 54 Stat. 898. *passim*

§ 7, 54 Stat. 908 ..... 40

28 U.S.C. § 1254(1) (1982)..... 2

28 U.S.C. § 2343 (1982) ..... 12

28 U.S.C. § 2348 (1982) ..... 12

MISCELLANEOUS

58 Cong. Rec. 8310 (1919)..... 31

84 Cong. Rec. 9881 (1939) ..... 44

84 Cong. Rec. 9882 (1939)..... 44

*Hearings on Extension of Tenure of Government Control of Railroads Before the Senate Comm. on Interstate Commerce*, 65th Cong., 3d Sess. (1919).....30, 31



TABLE OF AUTHORITIES – Continued

Page

*Hearings on H.R. 2531 Before the House Comm. on Interstate and Foreign Commerce*, 76th Cong., 1st Sess. (1939)..... 43

*Hearings on H.R. 4378 Before the House Comm. on Interstate and Foreign Commerce*, 66th Cong., 1st Sess. (1919)..... 30

*Hearings on H.R. 5500 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 1st Sess. (1933)..... 39

*Hearings on S. 1310, S. 2016, and S. 2009 Before the Senate Comm. on Interstate Commerce*, 76th Cong., 1st Sess. (1939) ..... 45

*Hearings on H.R. 5641 Before the House Comm. on Interstate and Foreign Commerce*, 70th Cong., 1st Sess. (1928)..... 35

*Hearings on S. 1580 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 1st Sess. (1933) .39, 40

*Hearings on S. J. Res. 161 Before the Senate Comm. on Interstate Commerce*, 71st Cong., 2d Sess. (1930) .36, 38

H.R. 2531, 76th Cong., 1st Sess. (1939) ..... 43

H.R. 5500, 73d Cong., 1st Sess. (1933).....39, 40

H.R. Rep. No. 328, 69th Cong., 1st Sess. (1926)..... 34

H.R. Rep. No. 95-1395, 95th Cong., 2d Sess. (1978) .... 23

D. J. Kozak, "Labor Protection in the Railroad Industry," in H. Northrup and P. Miscimarra (eds.), *Government Protection of Employees Involved in Mergers and Acquisitions* (1989)..... 46

TABLE OF AUTHORITIES – Continued

Page

T. Murray, "A New Look at Rail Employee Protection, Norfolk & Western R.R. v. Nemitz: An Appraisal," 24 Case W. Res. L. Rev. 103 (1972) .... 48

S. 1580, 73d Cong., 1st Sess. (1933) ..... 40

Title I, § 10 ..... 40

S. 2009, 76th Cong., 1st Sess. (1939).....44, 45

S. J. Res. 161, 71st Cong., 2d Sess. (1930) ..... 36

S. Rep. No. 606, 69th Cong., 1st Sess. (1926) ..... 34

S. Rep. No. 1182, 76th Cong., 3d Sess. (1940)..... 47

S. Rep. No. 94-499, 94th Cong., 2d Sess. (1975)..... 47

Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 93rd Cong., 2d Sess., *Legislative History of the Railway Labor Act, as Amended (1926 through 1966)* (1974)..... 33

No. 89-1028

In The

# Supreme Court of the United States

October Term, 1989

CSX TRANSPORTATION, INC.,

*Petitioner,*

v.

BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,

*Respondents.*

## BRIEF FOR THE PETITIONER

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit in *Brotherhood of Ry. Carmen v. ICC*, as amended by order dated September 29, 1989 (Pet. App. 27a-28a), is reported at 880 F.2d 562. Pet. App. 1a-26a. The June 8, 1988, decision of the Interstate Commerce Commission in *CSX Corp. – Control – Chessie Sys. & Seaboard Coast Line Indus.* is reported at 4 I.C.C. 2d 641. Pet. App. 33a-52a. The March 23, 1987, arbitration decision (Pet. App. 53a-117a), which was reviewed by the Interstate Commerce Commission, is unreported.

## JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered its judgment on July 25, 1989. Pet. App. 29a. CSXT timely filed a petition for rehearing, which was denied by the court of appeals by order dated September 29, 1989. Pet. App. 30a.[2] The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1) (1982).

## STATUTES INVOLVED

Section 11341(a) of the Interstate Commerce Act ("ICA"), 49 U.S.C. § 11341(a) (1982), is set forth in an Appendix to this brief. App., *infra*, at 1a. Section 11341(a)'s predecessors, found in (i) § 407 of the Transportation Act of 1920, ch. 91, 41 Stat. 480; (ii) Title II, § 202 of the Emergency Railroad Transportation Act of 1933, ch. 91, 48 Stat. 219; and (iii) § 7 of the Transportation Act of 1940, ch. 722, 54 Stat. 908-09, are set forth in Pet. App. 118a-119a.

[2] A petition for rehearing was also filed by Norfolk & Western Railway Company and Southern Railway Company, intervenors in D.C. Cir. No. 88-1694. *See* n.1, *supra*. This petition was denied by the court of appeals on September 29, 1989. Pet. App. 30a. The Interstate Commerce Commission also filed a petition for rehearing, in which it asked the court of appeals to defer any ruling thereon until after the Commission's decision on remand. By order dated September 29, 1989, the court remanded the record in this matter to the Commission and ordered that consideration of the Commission's petition be deferred pending release of the ICC's decision on remand. Pet. App. 32a.



## STATEMENT OF THE CASE

### I. The Statutory Framework

Congress has granted the Interstate Commerce Commission ("ICC" or "Commission") exclusive authority under Chapter 113 of the Interstate Commerce Act, 49 U.S.C. §§ 11301-11367 (1982), to examine, condition, and approve proposed railroad mergers and consolidations.[3] The ICA requires the Commission to "approve and authorize a transaction under this section when it finds that the transaction is consistent with the public interest." 49 U.S.C. § 11344(c) (1982). Among the factors that the Commission must consider in making its public interest determination are "the interests of carrier employees affected by the proposed transaction." 49 U.S.C. § 11344(b)(1)(D) (1982).[4]

[3] Chapter 113 governs not only carrier mergers but the exercise of control by one carrier over another or by a holding company over more than one rail carrier. *See* ICA § 11343(a)(3), (4), (5), 49 U.S.C. § 11343(a)(3), (4), (5) (1982).

[4] The Commission's mandate is to consider the entire spectrum of interests in evaluating whether a proposed consolidation is in the public interest. Employee interests are only one of the factors; Congress clearly did not state that employee interests were to take precedence. The Commission is required to consider "at least":

> (A) the effect of the proposed transaction on the adequacy of transportation to the public;
>
> (B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transactions;
>
> (C) the total fixed charges that result from the proposed transaction;

(Continued on following page)

ICA § 11347 requires the Commission to impose conditions to protect the interests of employees who are adversely affected by an approved consolidation. 49 U.S.C. § 11347 (1982). The Commission has satisfied this requirement by imposing its *New York Dock* labor conditions[5] since 1979 in carrier consolidation proceedings. The *New York Dock* Conditions provide employees affected by a rail consolidation with up to six years of income protection from the time they are first adversely affected as well as reimbursements for moving costs and losses from the sale of a home, where applicable. *New York Dock* Conditions, Art. I, §§ 5, 6, 9, 12; *New York Dock*, 360 I.C.C. at 86-89.

The *New York Dock* Conditions also contain a mandatory, expedited bargaining/arbitration procedure for the establishment of so-called "implementing agreements" between rail carriers and the rail unions that represent employees affected by an ICC-approved consolidation. These implementing agreements govern how the actual

---

(Continued from previous page)

(D) the interest of carrier employees affected by the proposed transaction; and

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

49 U.S.C. § 11344(b)(1) (1982). *Cf. McLean Trucking Co. v. United States*, 321 U.S. 67, 85 (1944) (While ICC is to consider effect of consolidation on competition, "the Commission is not to measure proposals for all-rail or all-motor consolidations by the standards of the anti-trust laws".); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 456 (1945) (*semble*).

[5] *New York Dock Ry. – Control – Brooklyn E. Dist. Term.*, 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).



consolidation of operations is to occur. Under Art. I, § 4(a) of the conditions, the carrier must give those employees who will be affected by such an operational change and their unions at least 90 days advance written notice. If the carriers and unions are unable to agree on such an implementing agreement after bargaining for 30 days, either party may submit the dispute for an expedited determination by a neutral arbitrator. *Id.* at 85.[6]

Once a rail carrier consolidation has been approved by the Commission, § 11341(a) of the ICA expressly immunizes the carriers from compliance with obligations arising out of "the antitrust laws and *from all other law*, including State and municipal law, as necessary" to allow them to carry out the approved consolidation. Emphasis added.

---

[6] In contrast, the bargaining procedures of the Railway Labor Act ("RLA") (RLA §§ 5, 6, 7, 45 U.S.C. §§ 155, 156, 157 (1982)) are neither bounded nor expedited. Because arbitration of so-called "major disputes," involving changes in bargaining agreements and working conditions, is purely voluntary under the RLA (*see* RLA §§ 5 First, 7 First, 45 U.S.C. §§ 155 First, 157 First), "[n]o authority is empowered to decide the dispute," and "the parties [are] wholly free at their own will, to agree or not agree." *Elgin J. & E. R.R. v. Burley*, 325 U.S. 711, 725 (1945); *see also Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 579 n.11 (1971). Moreover, these procedures are "purposely long and drawn out," "almost interminable," and "virtually endless." *Brotherhood of Ry. Clerks v. Florida E. C. R.R.*, 384 U.S. 238, 246 (1966); *Detroit & T. S. L. R.R. v. United Transp. Union*, 396 U.S. 142, 149 (1969); *Burlington N. R.R. v. Brotherhood of Maint. of Way Employees*, 481 U.S. 429, 444 (1987). While carriers are free to implement changes once they have finally exhausted the RLA bargaining procedures, they are then faced with the prospect of crippling strikes, including nationwide secondary picketing, to block such changes. *Florida E. C. R.R.*, 384 U.S. at 244; *Burlington N. R.R.*, 481 U.S. at 451-53.

## II. The Creation of the Consolidated CSX Rail System

In 1980, the ICC approved, pursuant to 49 U.S.C. § 11343, the application of CSX Corporation to control the rail subsidiaries of Chessie System, Inc. and Seaboard Coast Line Industries, Inc.[7] *CSX Corp. – Control – Chessie Sys. & Seaboard Coast Line Indus.*, 363 I.C.C. 521 (1980) ("*CSX – Control*"). After weighing all of the evidence before it, including evidence and arguments submitted by rail labor (*see* 49 U.S.C. § 11344(b)(1)(D)), the Commission concluded that substantial economies would result from the creation of this consolidated rail system and, accordingly, that the proposal was consistent with the public interest. 49 U.S.C. § 11344(c); *CSX – Control*, 363 I.C.C. at 597-98. The Commission imposed upon the carriers its standard *New York Dock* labor protection conditions. *Id.* at 589.

Both carrier and labor witnesses in *CSX – Control* recognized that the carriers, as a result of the authority conferred on them by the Commission, would be enabled to make numerous operational changes, including shop consolidations,[8] to realize the efficiencies flowing from

---

[7] Among the railroads controlled by Chessie was The Chesapeake and Ohio Railway Company ("C&O"). Seaboard Coast Line Industries controlled the Seaboard Coast Line Railroad Company ("SCL") and the Louisville and Nashville Railroad Company ("L&N"), *inter alia*. On December 29, 1982, SCL merged with L&N to form Seaboard System Railroad, Inc. On July 1, 1986, Seaboard System Railroad changed its name to CSX Transportation, Inc. ("CSXT"), Petitioner herein. C&O subsequently merged into CSXT in 1987.

[8] While the carriers did not specifically address the consolidation of the C&O freight car heavy repair shop at Raceland, Kentucky, and the comparable CSXT shop at Waycross,

(Continued on following page)



the consolidation. ICC C.I.[9] 1, Vol. II, App. C, Exh. 15, at 1-2, 7-11; Exh. 16.[10] Furthermore, the Commission also

---

(Continued from previous page)

Georgia, in the short-term operating plan they presented to the Commission, the carriers saw the elimination of excess capacity at Raceland as one major benefit of the proposed consolidation. *CSX – Control*, 363 I.C.C. at 538, 561.

[9] "ICC C.I." refers to the consolidated index of the ICC proceedings in *CSX – Control*, Finance Doc. No. 28905 (Sub-No. 22), filed on June 14, 1989, with the court of appeals below in No. 88-1724 (D.C. Cir.).

[10] For example, the General Counsel of the Brotherhood of Maintenance of Way Employees acknowledged in a verified statement filed in *CSX – Control*:

> It is apparent from the testimony presented by applicant's witnesses that extensive changes, many of which will not require separate Commission approval, will be undertaken once appropriate authority has been granted by this Commission. . . .

ICC C.I. 1, Vol. II, Exh. 17, at 8. Indeed, John O'B. Clarke, Jr., one of the attorneys for Respondent Brotherhood of Railway Carmen here and counsel for several rail unions in *CSX – Control*, explained to the Commission's administrative law judge:

> Your Honor, so far the evidence in this case shows that the plan that the CSX Corporation will follow once it is combined is a gradual identification of the strengths and weaknesses, and then after that is done there will be a gradual, we submit, coordination of operations as a result of that.
>
> * * * [I]f you didn't have a combination of systems, you wouldn't be able to change it by coordinating operations of one railroad into another railroad.

ICC C.I. 1, Vol. II, App. C, Exh. 18, at 1-2. In his brief to the Commission in *CSX – Control*, Mr. Clarke acknowledged that the Commission's approval of the control application would result in "consolidations of operations and rerouting of traffic which are bound to occur as the needs of the merged carrier develop." *Id.*, Exh. 20, at 9.

recognized, in its opinion granting the proposed consolidation, that "additional coordinations [not then specifically identified] may occur that could lead to further employee displacements" as a result of its grant of control authority. *CSX – Control*, 363 I.C.C. at 589. Nonetheless, the Commission rejected rail labor's request for enhanced labor protection benefits[11] beyond those provided in its *New York Dock* Conditions, which it found adequately protected the employees' interests. *Ibid.*

### III. Shop Consolidations and Operational Coordinations on the Consolidated CSX System

Following the Commission's decision in *CSX – Control*, the rail carriers controlled by CSX Corporation embarked on a series of operational changes designed to realize the economies and efficiencies the Commission had found to be in the public interest.

On at least three occasions these changes involved the movement of carmen's work and members of the Brotherhood of Railway Carmen ("BRC") from one CSX railroad to another. In each instance an arbitrator appointed under Art. I, § 4(a) of the *New York Dock*

---

[11] Rail labor asked the Commission, *inter alia*, to presume conclusively that any employee placed in a worse position within ten years of the date of the consolidation would be entitled to income protection, without any showing that such loss was caused by the consolidation, and to protect employees from being required to relocate their residences. *CSX – Control*, 363 I.C.C. at 589. The Commission recognized that such provisions, if adopted, would "preserve unnecessary jobs and unduly restrict a carrier's ability to establish economical operations" and "[its] ability to use its employees productively." *Id.* at 590.



Conditions prescribed an implementing agreement providing for the proposed movement of the work and employees, thereby overriding terms of the applicable bargaining agreements, in return for which the affected employees received the moving benefits and income protections contained in the conditions. *See* ICC C.I. 1, Vol. II, App. C, Exh. 26, 27, 28. BRC did not seek Commission review of any of these arbitration awards. Nor did it commence any judicial proceedings in which it argued that these changes could be carried out only after the seniority terms and other provisions of existing collective bargaining agreements had been modified through the bargaining procedures of the RLA.[12]

### IV. The Waycross-Raceland Shop Consolidation and the Arbitration Award

On August 29, 1986, CSXT and C&O gave their employees notice under *New York Dock* Art. I, § 4(a) of their intent to close the CSXT freight car heavy repair shop in Waycross, Georgia, and to consolidate that work with that being performed in the counterpart C&O shop at Raceland, Kentucky. When bargaining with BRC over the terms of an implementing agreement was not successful,

---

[12] Other operational changes and facility consolidations following *CSX – Control* that resulted in the movement of work and employees beyond the scope of then-existing collective bargaining agreements were routinely accomplished through the arbitration process prescribed in Art. I, § 4(a) of *New York Dock*. ICC C.I. 1, Vol. II, App. C, Exh. 29, 31, 32. In numerous other instances the railroads and unions, including BRC, were able to negotiate implementing agreements to govern such changes under Art. I, § 4(a) without having to invoke the services of a neutral arbitrator. *See, e.g., id.*, Exh. 33, 34, 35, 36A, 36B, 36C, 36D, and 46.

both the railroads and BRC invoked arbitration under *New York Dock* Art. I, § 4(a).

BRC argued in the arbitration proceeding that the three-person arbitration committee lacked authority under the *New York Dock* Conditions and the ICA to impose an implementing agreement moving carmen and their work beyond the boundaries of the former Seaboard system as a result of certain provisions in the so-called Orange Book Agreement, which was applicable to certain Waycross employees, and as a result of the basic collective bargaining agreements in place at Waycross and Raceland.[13] BRC contended that the carriers had to utilize the RLA bargaining procedures to amend these agreements to permit such movement.

The *New York Dock* arbitration committee, applying prior ICC precedents,[14] ruled that the bargaining/arbitration procedure prescribed in the Commission's labor

---

[13] The Orange Book Agreement is not the basic agreement governing the wages, rules, and working conditions of BRC members employed by CSXT. It is a protective agreement that was entered into by the Seaboard Air Line Railroad Company ("SAL") and the Atlantic Coast Line Railroad Company ("ACL") and the unions representing their employees in connection with the July 1, 1967, merger of those railroads to form SCL, a predecessor of Petitioner. *See* n.7, *supra*. The Orange Book protects those individuals who were employed by either SAL or ACL on or before the SCL merger from income loss for the remainder of their employment with CSXT and expressly allowed SCL to move employees and their work anywhere on the six-state SCL system.

[14] *Denver & R. G. W. R.R. – Trackage Rights – Missouri Pac. R.R. Between Pueblo, CO and Kansas City, MO*, ICC Dec. Finance Doc. No. 30,000 (Sub-No. 18) (served Oct. 25, 1983), *vacated and remanded sub nom. Brotherhood of Loc. Eng'rs v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *vacated*, 482 U.S. 270 (1987); *Maine Central R.R.*

(Continued on following page)



protection conditions supersedes the bargaining procedures of the RLA to resolve disputes in connection with the implementation of a rail consolidation as a result of ICA § 11341(a). Pet. App. 80a. Accordingly, the committee concluded that it had the authority to impose an implementing agreement that provided for the movement of both the freight car repair work and employees who performed it from Waycross to Raceland, notwithstanding the provisions in the Orange Book Agreement that it found prohibited such movements or any other existing collective bargaining agreements. Pet. App. 82a. The arbitration committee imposed an implementing agreement transferring car repair work to Raceland; it refused, however, to prescribe an implementing agreement that would allow the carriers to reassign Orange Book-protected employees to positions at Raceland. Instead, the arbitration award allowed these employees to remain in Waycross with their Orange Book income guarantees intact, notwithstanding the transfer of their freight car heavy repair work to Raceland.[15] Pet. App. 82a-85a.

## V. The Commission's Ruling on Appeal

Both BRC and CSXT appealed the arbitration award to the ICC. In its June 8, 1988, decision, the Commission

---

(Continued from previous page)

– *Exemption from 49 U.S.C. 11342 and 11343*, ICC Dec. Finance Doc. No. 30,532 (served Sept. 16, 1985), *aff'd mem. sub nom. Railway Labor Exec's' Ass'n v. ICC*, 812 F.2d 1443 (D.C. Cir. 1987).

[15] CSXT and C&O subsequently implemented the shop consolidation to the extent allowed by the arbitration award, transferring the repair work and non-Orange Book-protected employees to Raceland.

affirmed the arbitration committee's determination that it had the authority as a result of ICA § 11341(a) to prescribe an implementing agreement moving both work and employees, notwithstanding BRC's claims that such a change in existing agreements and working conditions could be accomplished only through the RLA's bargaining procedures. *CSX – Control*, 4 I.C.C. 2d at 649; Pet. App. 43a.[16] The Commission reversed the arbitration committee's refusal to provide for the transfer of employees protected by the Orange Book:

> [T]he Orange Book agreement as interpreted by the committee serves as an impediment to implementation of a transaction authorized by the Commission. Once it is determined that a proposed transaction is authorized by the Commission . . . , the carrier is permitted to carry out and fully implement the transaction despite potential impediments in existing agreements upon compliance with the provisions for the protection of employees contained in *New York Dock* or imposed by the Commission upon the involved transaction.

*Id.* at 650; Pet. App. 44a.

## VI. The Court of Appeals' Decision

BRC sought review of the Commission's decision by the D.C. Circuit,[17] which, in a July 25, 1989, opinion,

---

[16] The Commission also affirmed the arbitration committee's determination that the Waycross/Raceland shop consolidation was authorized by the Commission's 1980 order. *CSX – Control*, 4 I.C.C. 2d at 648; Pet. App. 42a.

[17] BRC initially filed a petition to review in the United States Court of Appeals for the Eleventh Circuit. The proceeding was subsequently transferred to the D.C. Circuit, pursuant to 28 U.S.C. § 2343 (1982). CSXT was granted leave to intervene under 28 U.S.C. § 2348 (1982) and Fed. R. App. P. 15(d).



reversed the Commission's decision and remanded the record to the Commission for further proceedings. The court of appeals ruled that ICA § 11341(a) does not empower the Commission to override contracts, including collective bargaining agreements.[18] *Brotherhood of Ry. Carmen*, 880 F.2d at 567-68; Pet. App. 19a. The court remanded the record to the Commission for consideration of whether modification of collective bargaining agreement provisions that would stand in the way of approved rail consolidations might be supported by other provisions of the ICA.[19]

---

[18] The court of appeals erroneously stated in its opinion that the Commission also had deprived Orange Book-protected carmen of their entitlement to that agreement's extended income protection benefits. *Brotherhood of Ry. Carmen*, 880 F.2d at 564; Pet. App. 6a. In fact, the Commission had reversed the arbitration award only "to the extent it holds that CSX may not require transfer of SCL employees as well as work from Waycross to Raceland." *CSX – Control*, 4 I.C.C. 2d at 650; Pet. App. 44a. Orange Book-protected carmen transferred to Raceland would have remained entitled to the income protections of that agreement.

[19] Thus, the court of appeals did not decide whether the Commission might possess the authority to prescribe a procedure, apart from the RLA, to modify such agreements as a component of the Commission's labor conditions under ICA § 11347, 49 U.S.C. § 11347. *Brotherhood of Ry. Carmen*, 880 F.2d at 573-74; Pet. App. 25a. Similarly, the court did not determine whether a carrier was immune from complying with the bargaining procedures of the RLA as a result of ICA § 11341(a), preferring to let the Commission reconsider this issue on remand. *Id.* at 573; Pet. App. 25a.

## SUMMARY OF ARGUMENT

The court of appeals' unprecedented ruling that Congress intended obligations arising out of collective bargaining agreements in the rail industry, enforceable solely as a result of the Railway Labor Act, to be an exception to § 11341(a) of the Interstate Commerce Act, which generally exempts railroads implementing consolidations approved by the Interstate Commerce Commission from "all other law . . . as necessary to . . . carry out the transaction", is in error and should be reversed by this Court for several reasons:

First, the court of appeals' decision is contrary to this Court's decision in *Schwabacher v. United States*, 334 U.S. 182 (1948), which interpreted § 11341(a)'s predecessor as immunizing consolidating rail carriers from contractual obligations that would otherwise interfere with an ICC-approved consolidation. In addition, the court of appeals ignored this Court's decision in *United States v. Lowden*, 308 U.S. 225 (1939), in which this Court expressly recognized that seniority rights flowing from rail collective bargaining agreements would of necessity be overriden in the implementation of an ICC-approved rail merger.

Second, the court of appeals' interpretation of § 11341(a) is contrary to the statute's plain terms, both as currently codified and as that section's language has evolved since the Transportation Act of 1920, ch. 91, 41 Stat. 456.

Third, the court of appeals' construction is contrary to the section's legislative history. The court below erred in its interpretation of the legislative history it did consider and, more importantly, ignored other Congressional actions – particularly the provisions of the Emergency Railroad Transportation Act of 1933, ch. 91, 48 Stat. 211, and the legislative history of the Transportation Act of 1940, ch. 722, 54 Stat. 898. The history of these two acts demonstrates Congress' express intent that obligations



arising out of the RLA and collective bargaining agreements entered into thereunder are not to be exceptions to the general immunity provisions of the ICA.

Finally, the court of appeals' decision, if not reversed, will seriously impede the attainment of this nation's Congressionally established transportation policy to foster and encourage the consolidation of rail carriers. As this Court has previously declared, Congress provided that, with respect to rail mergers found by the Commission to be in the public interest, the ICA is to be the "supreme law of the land";[20] all legal obstacles from any source must give way in order to ensure that such transactions can be carried out. The court of appeals' decision, however, elevates legal obligations flowing from rail collective bargaining agreements and the RLA to positions of primacy, effectively giving rail labor a veto power over the accomplishment of ICC-approved rail consolidations, despite the six-year income protection and relocation benefits provided to employees by statute. In doing so, the court of appeals ignored Congress' manifest intent.

## ARGUMENT

### I. The Court of Appeals' Decision, Interpreting the ICA Immunity Provisions, Is Contrary to Prior Decisions of this Court

The court of appeals cited no judicial precedent for its blanket conclusion that § 11341(a) does not give the ICC authority to override collective bargaining agreements even where necessary to implement an approved rail consolidation. In doing so, it ignored both controlling and instructive decisions of this Court.

This Court has previously ruled that the rail consolidation provisions of the Transportation Act of 1920, in

[20] *Schwabacher*, 334 U.S. at 198.

which the precursor of § 11341(a) was first enacted, "are to be given liberal construction in aid of the purposes Congress had in mind." *Escanaba & L. S. R.R. v. United States*, 303 U.S. 315, 320 (1938). In keeping with this admonition, this Court has already determined that the ICA immunity provisions free consolidating carriers from obligations arising out of contracts that would otherwise impede a transaction found to be in the public interest.

In *Schwabacher v. United States*, 334 U.S. 182, 188, 199 (1948), this Court considered whether the ICC had authority under ICA § 5(11), § 11341(a)'s predecessor, to supersede "contract rights" flowing from a rail corporation's charter.[21] Certain shareholders of the Pere Marquette Railway Company argued that the ICC was

---

[21] While this Court referred in *Schwabacher* to the shareholders' rights under Michigan law, it was clear that the source of such rights was not a state statute (a "positive enactment" in the vernacular of the court of appeals below) but the "promises" contained in Pere Marquette's corporate charter, a contract. *See* 334 U.S. at 199. *See also* Motion of the United States to Affirm at 8, *Schwabacher v. United States*, 334 U.S. 182 (1948) ("[The ICC] further concluded that if dissenting stockholders had individual *contract* rights which might be asserted under state law, that was a matter not within the Commission's province to decide.") (emphasis added); Brief for the Interstate Commerce Commission at 2, *id.* (Question Presented: "Whether . . . the Commission was required . . . to adjudicate and enforce the claimed *contractual* rights, arising under State law, of dissenting shareholders. . . .")(emphasis added); *SEC v. Central-Illinois Sec. Corp.*, 338 U.S. 96, 134 (1949) (result in *Schwabacher* based on Congress' purpose to avoid shifting investment values "by maturing *contract* rights which would not otherwise have matured") (emphasis added). Accordingly, the court of appeals below erred in interpreting *Schwabacher* as reaching only "state law [that] grant[ed] dissenting stockholders right to block merger". *Brotherhood of Ry. Carmen*, 880 F.2d at 571, Pet. App. 21a.



required to protect their contractual entitlement to accrued dividends in its order approving a proposed rail merger. The Commission disclaimed jurisdiction to pass upon their claims once it had found that the merger terms were just and reasonable as to each class of stockholders.

This Court rejected both positions. It held that the Commission was obligated under the ICA to pass upon and approve all capital liabilities to be assumed by the merged company or to be discharged as a result of the merger. *Id.* at 197-98. More importantly, this Court rejected the shareholders' claim that the Commission was bound to respect and protect their contractual claims. This Court observed that, as a result of the ICA's immunity provisions now found in § 11341(a), "[i]n matters within [the ICA's] scope it is the supreme law of the land." *Id.* at 198. Thus, the sole source of rights possessed by the shareholders was the ICA itself and its requirement that the merger terms be "just and reasonable." *Id.* at 198-99. In making such a determination, the Commission was to consider only the value of a shareholder's contribution to the merger, "not the promise that a charter made to him". *Id.* at 199.[22]

---

[22] This Court had established long before *Schwabacher* that ICC rail line abandonment orders supersede inconsistent provisions in state rail charters as a result of the commerce clause, even in the absence of express immunity language such as that found in § 11341(a). *See Texas v. United States*, 292 U.S. 522, 531 (1934) ("Even explicit charter provisions must yield to the paramount regulatory power of the Congress."); *Colorado v. United States*, 271 U.S. 153, 165 (1926) (*semble*); *New York v. United States*, 257 U.S. 591, 601 (1922) (*semble*).

In the court below BRC claimed that the ICC's actions amounted to a "taking" of its members' property in violation of the Fifth Amendment. The court of appeals did not reach

(Continued on following page)

Accordingly, this Court's rationale in *Schwabacher* establishes that obligations flowing from collective bargaining agreements (even if artificially divorced from the RLA, as the court of appeals would have it; *see* discussion *infra* at 24-29), like the claimed contract rights of the Pere Marquette shareholders, cannot stand in the way of the implementation of a rail consolidation found by the ICC to be in the public interest as a result of the ICA immunity provisions in § 11341(a).[23]

This Court has also considered the impact of ICC consolidation approvals on obligations arising out of collective bargaining agreements. Prior to the enactment of the Transportation Act of 1940, the Commission had

---

(Continued from previous page)

this issue. *Brotherhood of Ry. Carmen*, 880 F.2d at 574; Pet. App. 26a. This Court has long recognized that contracts that deal with a subject matter appropriately regulated by the federal government under the commerce power may be superseded without violating the Fifth Amendment. *See, e.g., Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986); *Norman v. Baltimore & O. R.R.*, 294 U.S. 240, 307-11 (1935); *New York v. United States*, 257 U.S. at 601; *Louisville & N. R.R. v. Mottley*, 219 U.S. 467, 480-82 (1911); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 230 (1899).

[23] *See also Altman v. Central of Georgia Ry.*, 488 F.2d 1302, 1305-07 (D.C. Cir. 1973) (contractual entitlement to dividends under rail corporation's charter does not survive ICC approval of rail consolidation); *Mississippi River Fuel Corp. v. Slayton*, 359 F.2d 106, 113 (8th Cir. 1966) (Blackmun, J.) (charter provisions "must give way" unless recognized by ICA), *rev'd on other grounds sub nom. Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162 (1967); *City of Palestine, Texas v. United States*, 559 F.2d 408, 413-14 (5th Cir. 1977) (assuming, but not deciding, that ICC has authority under immunity provision to abrogate private contract requiring railroad to maintain facilities in Palestine, Texas), *cert. denied*, 435 U.S. 950 (1978).



imposed labor conditions on consolidating carriers to protect the incomes of affected employees in *Chicago, R.I. & G. Ry. Trustees Lease, 230 I.C.C. 181 (1938)*. This Court upheld the Commission's inherent authority under the ICA to impose such conditions in *United States v. Lowden*, 308 U.S. 225 (1939). In so doing, this Court recognized that such income protections were necessary and proper in view of the fact that employees otherwise would inevitably suffer adverse effects from such transactions, including the loss of contractual seniority rights:

> Not only must unification result in wholesale dismissals and extensive transfers, involving expense to transferred employees, *but in the loss of seniority rights* which, by common practice of the railroads are restricted in their operation to those members of groups who are employed at specified points or divisions.

308 U.S. at 233; emphasis added. Significantly, nowhere in *Lowden* did this Court even suggest that carriers could only override contractual seniority provisions through the bargaining processes of the RLA. This Court's implicit recognition that such contract rights were overridden as a result of ICC approval of a rail consolidation is inconsistent with and mandates reversal of the decision of the court of appeals.[24]

In addition, four members of this Court have previously declared that an ICC consolidation order supersedes inconsistent provisions in RLA collective bargaining agreements as a result of § 11341(a). In *ICC v.*

---

[24] *See also Railway Labor Exec's' Ass'n v. United States*, 339 U.S. 142, 147 (1950) (noting awareness prior to 1940 Act's passage that economies flowing from rail consolidations "could be realized only at the expense of displaced railroad labor").

*Brotherhood of Loc. Eng'rs*, 482 U.S. 270 (1987), the union argued that its members had rights under the RLA *and their collective bargaining agreements* to perform certain work and that those rights were violated by an ICC trackage rights order that approved other labor arrangements. *Id.* at 295. The railroads responded that they were immune from complying with these agreement terms and the RLA as a result of § 11341(a). A panel of the D.C. Circuit ruled that the Commission was required to make explicit findings of "necessity" before the immunity provision would apply. *Brotherhood of Loc. Eng'rs v. ICC*, 761 F.2d 714, 723 (D.C. Cir. 1985).[25]

The majority in this Court did not reach this issue, ruling that the D.C. Circuit had lacked jurisdiction over the union's petition for administrative review. 482 U.S. at 277-87. Justice Stevens, in a concurring opinion joined by Justices Brennan, Marshall, and Blackmun, however, would have reached the merits and would have reversed the D.C. Circuit on the ground that the immunity provisions of the ICA are self-executing and do not depend on any explicit "necessity" findings. 482 U.S. at 298. Significantly, these Justices did not even intimate that § 11341(a) does not encompass obligations arising out of collective bargaining agreements in the rail industry.[26]

---

[25] In so ruling, the D.C. Circuit implicitly held that the ICC had the statutory authority to immunize rail carriers from compliance with the RLA and obligations arising out of collective bargaining agreements, so long as it made express findings of the "necessity" for such immunity.

[26] As Justice Stevens' concurring opinion noted, the breadth of the exemption conferred by § 11341(a) "is defined by the scope of the approved transaction." *ICC v. Brotherhood of Loc. Eng'rs*, 482 U.S. at 298. In this case, the ICC determined

(Continued on following page)



*Schwabacher's* holding that the immunity provisions now found in § 11341(a) of the ICA encompass contractual obligations, such as obligations flowing from RLA collective bargaining agreements, is firmly supported by the plain terms of the statute, its detailed legislative history, and the significant public policies that underlay its enactment. It is to each of these that we now turn.

## II. The Plain Terms of § 11341(a) Immunize Rail Carriers from Obligations in Collective Bargaining Agreements that Impede an ICC-Approved Rail Consolidation

This Court has often declared that the starting point for interpreting a statute is the language itself. "If the statute is clear and unambiguous 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' " *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (*quoting Chevron U.S.A. Inc.*, 467 U.S. at 842-43); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988). Congress has repeatedly plainly stated its intention that the immunity provisions governing rail consolidations in the ICA apply to all legal obstacles and restraints, regardless of their source.

The current version, ICA § 11341(a), unambiguously relieves consolidating carriers from "the antitrust laws and from *all other law, including State and municipal law*" in order to permit those carriers to implement a consolidation found to be in the public interest. Thus, regardless of

---

(Continued from previous page)

that the Waycross/Raceland shop consolidation was within the authority it had conferred on the carriers in *CSX – Control*. *See* n.16, *supra*. The court of appeals did not disturb this finding.

the source – federal, state, or local – Congress has decreed that all legal obstacles to the accomplishment of an approved transaction are swept aside as a result of that section's terms.[27]

The antecedents to this immunity provision confirm the breadth of the section's reach. Section 11341(a) originated in the Transportation Act of 1920. Section 5(8) of the ICA, added by § 407 of the 1920 Act, broadly relieved consolidating carriers from *"all other restraints or prohibitions by law, State or Federal."* 41 Stat. 480; Pet. App. 118a. This provision was reworded when the consolidation section of the ICA was revised in Title II, § 202 of the Emergency Railroad Transportation Act of 1933 ("ERTA"), ch. 91, 48 Stat. 217 *et seq.* The immunity conferred on consolidating carriers was contained in renumbered ICA § 5(15), which relieved such railroads from *"all other restraints or prohibitions by or imposed under authority of law, State or Federal."* 48 Stat. 219; Pet. App. 119a. The Transportation Act of 1940 further modified the immunity language, relocated to ICA § 5(11), to relieve merging carriers from *"all other restraints, limitations, and prohibitions of law, Federal, State, or municipal."* 54 Stat. 908-09; Pet. App. 119a-120a. The simplification of this provision,

---

[27] The plain language of § 11341(a) establishes that it was intended to encompass obligations arising under federal law beyond the restrictions found in the anti-trust laws. *See Texas v. United States*, 292 U.S. at 534 (rejecting argument that immunity was limited to restraints "which fall within the general description of 'anti-trust' legislation"); *see also Southern Pac. Transp. Co. v. ICC*, 736 F.2d 708, 721 n.10 (D.C. Cir. 1984) (§ 11341(a) exempts carrier from obligations under the Pacific Railroad Acts, 45 U.S.C. § 83 (1982)), *cert. denied*, 469 U.S. 1208 (1985).



currently found in § 11341(a), that occurred during the general recodification of the ICA in 1978[28] was not intended to result in any substantive change. *See ICC v. Brotherhood of Loc. Eng'rs*, 482 U.S. at 299 n.12 (Stevens, J., concurring); *see also* H.R. Rep. No. 95-1395, 95th Cong., 2d Sess. 158-60 (1978); *Trailer Marine Trans. Corp. v. FMC*, 602 F.2d 379, 383 n.18, 384 (D.C. Cir. 1979).

Despite the breadth of the immunity language, the court of appeals ruled that Congress' failure to include an express reference to "contracts" or collective bargaining agreements in 1920 or in any of the section's later versions meant that Congress intended to immunize carriers only from "laws": "positive enactments, not common law rules of liability, as on a contract." *Brotherhood of Ry. Carmen*, 880 F.2d at 567, 570; Pet. App. 12a, 18a. This artificially narrow interpretation – that Congress intended to encompass only "statutes" and other "positive enactments" – cannot be squared with the words Congress actually used.

Congress' consistent reference in the immunity provision since 1920 to "law" demonstrates the intended breadth of its reach. As this Court has previously observed, "The term law in our jurisprudence includes the rules of court decisions as well as legislative acts." *Warren v. United States*, 340 U.S. 523, 526 (1951).[29] Congress

---

[28] Pub. L. No. 95-473, § 3(a), 92 Stat. 1466.

[29] Indeed, in broadly defining the immunity granted consolidating carriers, Congress was presumably mindful of *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899), where this Court had recognized that "private contracts may in truth be as far reaching in their effect upon interstate commerce as would the legislation of a single State of the same character." *Id.* at 229-30. In *Addyston Pipe* this Court soundly

(Continued on following page)

clearly intended to free carriers from legally enforceable restraints and prohibitions arising from any source, not simply those flowing from federal, state, or local legislative action.[30] The court of appeals' distinction between statutory and other legally enforceable restraints, such as those arising from a contract, is not only contrary to the express terms used by Congress but is inconsistent with this Court's repeated recognition that, "[o]nce courts enforce [an] agreement, the sanction of government is, of course, put behind them." *Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 232 n.4 (1956) (*citing Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 24 (1948); and *Barrows v. Jackson*, 346 U.S. 249 (1953)).

Moreover, the court of appeals' analysis was premised on an unprecedented fundamental flaw of reasoning:

---

(Continued from previous page)

rejected the contention that the power of Congress to regulate under the Commerce Clause did not permit interference with private contracts but only reached "acts of interference by state legislation or by means of regulations made under the authority of the State by some political subdivision thereof". *Id.* at 227.

[30] Congress' intent in 1920 that the phrase "other restraints or prohibitions by law, State or Federal" in ICA § 5(8) reach beyond state regulatory statutes was further demonstrated by the fact that Congress provided in ICA § 5(6)(c) that, after the ICC had issued an order approving a rail consolidation, "such consolidation may be effected, in accordance with such order, if all the carriers involved assent thereto, *the law of any State or the decision or order of any State authority to the contrary notwithstanding.*" 41 Stat. 480; emphasis added. Had Congress intended to immunize consolidating carriers only from affirmative state enactments, the broad reference to prohibitions "by law" in § 5(8) would have been superfluous in light of § 5(6)(c).



the court considered § 11341(a)'s application to obligations contained in collective bargaining agreements as somehow separate from the effect of that section on rights and obligations arising directly from the Railway Labor Act. *Brotherhood of Ry. Carmen*, 880 F.2d at 567, 570; Pet. App. 12a, 19a.

In fact, however, as this Court has repeatedly declared, collective bargaining agreements in the rail industry are purely creatures of the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982). The RLA ordinarily provides the exclusive means for the enforcement and modification of obligations contained within such agreements. *See, e.g., Detroit & T. S. L. R.R. v. United Transp. Union*, 396 U.S. at 156 (RLA § 2 Seventh, 45 U.S.C. § 152 Seventh, "operates to give legal and binding effect to collective agreements"); *Chicago & N. W. Ry.*, 402 U.S. at 576-78 (RLA § 2 First, 45 U.S.C. § 152 First, creates legally enforceable obligation to "make and maintain" agreements); *Andrews v. Louisville & N. R.R.*, 406 U.S. 320, 323 (1972) (an RLA agreement is " 'a federal contract and . . . therefore governed and enforceable by federal law,' " *quoting International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 692 (1963)); *Railway Employes' Dep't v. Hanson*, 351 U.S. at 232 ("A union agreement made pursuant to the Railway Labor Act has . . . the imprimatur of the federal law upon it. . . ."). Indeed, as creatures of the RLA – a federal law – rail collective bargaining agreements have been held to supersede inconsistent provisions of state law under the Supremacy Clause. *See California v. Taylor*, 353 U.S. 553, 561 (1957) (RLA collective bargaining agreement with state-owned railroad takes precedence over contrary state civil service law).

Moreover, prior to the court of appeals' decision herein, at least four courts of appeals had ruled that an

ICC-authorized consolidation supersedes both inconsistent terms in collective bargaining agreements and the provisions of the RLA, from which they originate, as a result of the ICA immunity provisions in § 11341(a). In doing so, none of these courts has drawn the distinction relied upon by the court of appeals in this case. Each has ruled that the ICA immunity provisions encompass collective bargaining agreements and other RLA-based obligations alike.

In the seminal decision in *Brotherhood of Loc. Eng'rs v. Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963), the Eighth Circuit rejected union arguments that a carrier was required to comply with the RLA bargaining procedures to modify collective bargaining agreement seniority terms that otherwise would have prevented it from rearranging its forces after an ICC-approved merger, holding that the dispute resolution procedures contained in the labor conditions approved by the Commission occupied the field as a result of the immunity provisions of the ICA. "[T]he ICC['s] power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist." *Id.* at 430. The Eighth Circuit concluded, " 'A private contract must yield to the paramount power of the [Commission] to perform its duties under the statute creating it to approve mergers. . . .' " *Ibid.* (*quoting Kent v. CAB*, 204 F.2d 263, 266 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953)).

The Seventh Circuit has also ruled that the ICA immunity provisions supersede the RLA and collective bargaining agreements. *Burlington N., Inc. v. American Ry. Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974) (ICC-approved merger protection agreement found not to be



inconsistent with RLA but "if it were its provisions would be controlling"), *cert. denied*, 421 U.S. 975 (1975). The Sixth Circuit similarly has acknowledged the necessity for supplanting bargaining agreements and the RLA in an ICC-authorized transaction in *Nemitz v. Norfolk & W. Ry.*, 436 F.2d 841, 845 (6th Cir.) (ICC's authority to effectuate mergers would be "rendered ineffective if authority to adjust work realignments through fair compensation did not exist"), *aff'd on other grounds*, 404 U.S. 37 (1971).[31]

---

[31] *See also Railway Labor Exec's' Ass'n v. Guilford Transp. Indus., Inc.*, 667 F. Supp. 29, 35 (D. Me. 1987), *aff'd per curiam*, 843 F.2d 1383 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 3213 (1989); *Brotherhood of Loc. Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794, 800-01 (1st Cir.) ("ICC has the power to approve a transaction and exempt its participants from legal obstacles that would impede its fruition", including the bargaining procedures of the RLA), *cert. denied*, 479 U.S. 829 (1986); *Burlington N. R.R. v. United Transp. Union*, 848 F.2d 856, 863 (8th Cir.) ("When the ICA provides a specific exemption from all other law and mandates inescapable employee protective conditions under provisions such as 49 U.S.C. §§ 11341(a), 11347, it effectively supersedes . . . the RLA. . . ."), *cert. denied*, 109 S. Ct. 1130 (1988); *Missouri Pac. R.R. v. United Transp. Union*, 782 F.2d 107, 111 (8th Cir. 1986) ("MOPAC is exempted under § 11341(a) of the Interstate Commerce Act . . . from the requirements of the Railway Labor Act (RLA) with respect to major disputes"), *cert. denied*, 482 U.S. 927 (1987); *Bundy v. Penn Cent. Co.*, 455 F.2d 277, 279-80 (6th Cir. 1972); *United Transp. Union v. Norfolk & W. Ry.*, 332 F. Supp. 1170, 1174 (N.D. Ohio 1971).

Indeed, for almost four decades the courts have similarly ruled that the Civil Aeronautics Board in airline mergers had the authority to supersede both the RLA bargaining procedures and collective bargaining agreement provisions that interfered with the merger, even in the absence of express statutory language comparable to § 11341(a). *International*

(Continued on following page)

Finally, the ICC has repeatedly held that, as a result of the immunity provisions of the ICA, its labor protective conditions and the terms of implementing agreements established thereunder supersede both the bargaining procedures of the RLA and collective bargaining agreement terms that would otherwise impede an approved rail consolidation.[32] The court of appeals erred

---

(Continued from previous page)

*Ass'n of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); *International Ass'n of Machinists v. Northeast Airlines, Inc.*, 473 F.2d 549, 559-60 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972); *Kesinger v. Universal Airlines, Inc.*, 474 F.2d 1127, 1131-32 (6th Cir. 1973); *American Airlines v. CAB*, 445 F.2d 891, 896 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972); *Kent v. CAB*, 204 F.2d 263, 265-66 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953).

Subsequent to the court of appeals' decision herein, another panel of the D.C. Circuit and an Eighth Circuit panel, both in *dicta*, have cited the holding of the instant case without further analysis. *See Railway Labor Exec's' Ass'n v. ICC*, 883 F.2d 1079, 1082 (D.C. Cir. 1989); *Brotherhood of Loc. Eng'rs v. ICC*, 885 F.2d 446, 449 (8th Cir. 1989).

[32] *See, e.g., Maine Central, supra* n. 13; *Denver & R. G. W. R.R., supra* n.13; *Norfolk & W. Ry. – Merger*, 347 I.C.C. 506, 511-12 (1974).

The Commission has similarly ruled that its approval of a rail consolidation overrides inconsistent provisions in other types of agreements. *See, e.g., Missouri P. R.R. – Merger – Texas & P. Ry.*, 348 I.C.C. 414, 430 (1976), *rev'd sub nom. City of Palestine, Texas v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978), and cases cited therein (Commission has authority to relieve carriers from contractual obligations in consolidation proceedings under ICA). The court of appeals misinterpreted the Commission's decision in *Gulf, M. & O. R.R. – Abandonment*, 282 I.C.C. 311 (1952), as indicating that the Commission does not believe it is empowered to override private contracts. *Brotherhood of Ry. Carmen*, 880 F.2d

(Continued on following page)



in refusing to accord the Commission's interpretation of its governing statute the "considerable weight" to which it is entitled. *Chevron U.S.A., Inc.*, 467 U.S. at 844-45.

Accordingly, obligations flowing from collective bargaining agreements in the rail industry can interfere with, or impede carriers from carrying out, ICC-approved consolidations solely because such obligations have their genesis in, and can ordinarily only be changed through the "virtually endless" processes of, the RLA, a federal "law" within the meaning of ICA § 11341(a). As a result, the court of appeals' conclusion that that section does not reach restraints or prohibitions arising out of such agreements is clearly contrary to § 11341(a)'s plain terms.

## III. The Legislative History of the ICA's Immunity Provisions Establishes that Congress Intended to Encompass Obligations Arising from Rail Collective Bargaining Agreements

The court of appeals stated that it found no support in the legislative history of the ICA immunity provisions for ICC's position that obligations arising from rail collective bargaining agreements were encompassed therein.

---

(Continued from previous page)

at 567; Pet. App. 13a. *Gulf* was an abandonment proceeding, to which the immunity provisions of the ICA's consolidation chapter do not apply. In fact, as the ICC explained therein, it is empowered to set aside "vested rights of other parties . . . upon a clear grant of statutory authority similar to that contained in Section 5(11) [now § 11341(a)]." *Gulf*, 282 I.C.C. at 335. *But see Brandywine Valley R.R. – Purchase – CSX Transp., Lines in Florida*, 5 I.C.C. 2d 764, 772 n.5 (1989), where the Commission, following the remand from the D.C. Circuit in the instant case, stated that it "[did] not dispute the limited holding" of the court of appeals.

*Brotherhood of Ry. Carmen*, 880 F.2d at 568-70; Pet. App. 18a-19a. The court focused its attention exclusively on the enactments of the Transportation Act of 1920 and the Railway Labor Act, passed in 1926. As shown below, the court misconstrued the very legislative history it surveyed. More importantly, however, the court ignored the probative legislative history of the Emergency Railroad Transportation Act of 1933, where Congress expressly excepted obligations flowing from the RLA and rail collective bargaining agreements from the immunity provisions of the ICA *on a temporary basis*, while rejecting the inclusion of such an exception in the permanent ICA. The court also ignored the Transportation Act of 1940, where Congress rejected similar proposals to except collective bargaining agreements from § 11341(a)'s predecessor. This history confirms that Congress intended § 11341(a) to encompass obligations arising from collective bargaining agreements.

### A. The Transportation Act of 1920

The court of appeals correctly observed that the witnesses and Congressmen who addressed the immunity provisions that were enacted in the Transportation Act of 1920 were primarily concerned with freeing consolidating railroads from restraints flowing from the federal antitrust laws and state regulatory statutes. *Brotherhood of Ry. Carmen*, 880 F.2d at 568-70; Pet. App. 13a-18a.[33] There was

---

[33] *See, e.g., Hearings on H.R. 4378 Before the House Comm. on Interstate and Foreign Commerce*, 66th Cong., 1st Sess., pt. 7, 1103 (1919) (testimony of George Post, Chairman of U.S. Chamber of Commerce Railroad Committee); *Hearings on Extension of Tenure of Government Control of Railroads Before the Senate Comm. on*

(Continued on following page)



no discussion directly concerning the effects of the broad language enacted in ICA § 5(8) on contracts or other common law obligations, much less on contractual obligations arising between rail carriers and rail unions.[34]

Congress' silence in this regard provides no support for the conclusion that Congress intended to exempt

---

(Continued from previous page)

*Interstate Commerce*, 65th Cong., 3d Sess., pt. 1, 110-13 (1919) (testimony of William G. McAdoo, Director General of Railroads); *id.*, pt. 2, 327 (testimony of Thomas DeWitt Cuyler); *id.*, pt. 3, 517-20, 537-51 (testimony of Alfred P. Thom, General Counsel of Association of Railway Executives); 58 Cong. Rec. 8310 (1919) (Rep. Esch).

[34] However, the Senate Committee on Interstate Commerce, which held hearings in 1919 concerning legislation to end the government's control of the railroads, ordered the transcript of hearings held in 1916 and 1917 before the Joint Congressional Committee on Interstate and Foreign Commerce to be reprinted as an appendix to the 1919 hearing transcript. In 1916, Alfred P. Thom, Counsel to the Railroad Executives' Committee, testified concerning a proposal to create federal corporations to own the railroads and the contract rights of stockholders and creditors that would be affected thereby. Mr. Thom referred to this Court's decision in *Louisville & N. R.R. v. Mottley*, 219 U.S. 467 (1919), and concluded, "[T]here could not be a contract right acquired by one of the investors in these railroads chartered to do an interstate business which would limit the power of the Federal government to fully regulate that instrumentality. . . . They . . . took their rights subject to the future exercise by Congress of that power to regulate commerce to the fullest extent that Congress might feel that the public interest might demand. . . . [W]hen the bondholder lent his money to a railroad engaged in interstate commerce, then ex necessitati they both did that subject to any legitimate regulation of commerce in the future which Congress might undertake." *Hearings on Extension of Tenure of Government Control of Railroads, supra*, Appendix at 172-73.

collective bargaining agreements or labor law obligations from the broad sweep of the 1920 Act's immunity provisions. Indeed, in Title III of the 1920 Act, Congress enacted machinery to resolve "Disputes between Carriers and their Employees and Subordinate Officials", the immediate forerunner to the RLA. 1920 Act, Title III, §§ 300-16, 41 Stat. 469-74.[35] Significantly, however, Congress did not except this labor relations statute from the all-encompassing immunity provisions of the ICA – superseding "all . . . restraints or prohibitions by law, State or *Federal*" – that it enacted in Title IV, § 407 of the 1920 Act. Had Congress intended to except federal rail labor relations obligations from the reach of ICA § 5(8), it could easily have done so.[36]

---

[35] The labor relations provisions of the 1920 Act proved to be "highly unsatisfactory", thus leading to the passage of the RLA six years later. *International Ass'n of Machinists v. Central Airlines*, 372 U.S. at 687; *see also International Ass'n of Machinists v. Street*, 367 U.S. 740, 757 n.12 (1961).

[36] In sharp contrast, when Congress intended to except obligations flowing from collective bargaining agreements from the ICA immunity provisions, it clearly expressed such an intent. *See* the Emergency Railroad Transportation Act of 1933, discussed *infra* at pp. 39-42. *Cf. NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 279 (1974) (holding that managerial personnel are not "employees" under the National Labor Relations Act, which is silent on the subject, on grounds that, "where Congress desired to include managerial or supervisory personnel in the category of employees, it did so expressly," citing the RLA as an example).



**B. The Railway Labor Act**

The Railway Labor Act, enacted in 1926 (ch. 347, 44 Stat. 577-87, *codified at* 45 U.S.C. §§ 151-188 (1982)), was the product of an historic agreement between representatives of the major railroads and major rail labor unions. *See Chicago & N.W. Ry.*, 402 U.S. at 576; *International Ass'n of Machinists v. Street*, 367 U.S. at 758; *Texas & N.O. R.R. v. Brotherhood of Ry. Clerks*, 281 U.S. 548, 563 (1930).

There was little discussion of the relationship between the RLA and the ICA, as amended only six years earlier in the Transportation Act of 1920, during the congressional hearings or debates. Significantly, at no time during these proceedings did any senator or representative suggest that the RLA or collective bargaining agreements arising thereunder would not be among those "restraints or prohibitions by law, State or Federal" encompassed within the broad immunity provisions then found in ICA § 5(8). Thus, there was no suggestion that carriers that were authorized to consolidate by the ICC could not be relieved of compliance with obligations arising under the RLA or such agreements. Nor did the RLA, as enacted and as subsequently amended, contain any such provision.

The court of appeals nevertheless purported to find "a healthy respect for privately negotiated contracts" in two aspects of the legislative history of the RLA. *Brotherhood of Ry. Carmen*, 880 F.2d at 570; Pet. App. 18a. First, the court correctly noted that several congressmen questioned the constitutionality of a proposed amendment that would have allowed the ICC to set aside wage agreements. *See, e.g.*, Subcommittee on Labor of the Senate

Committee on Labor and Public Welfare, 93rd Cong., 2d Sess., *Legislative History of the Railway Labor Act, as Amended (1926 through 1966)* 539, 550, 559-60 (1974) (hereinafter *"RLA Legislative History"*) (Sen. Wheeler). But the supporters of such a provision sharply disputed this conclusion. *See, e.g., id.* at 539 (Sen. Curtis), 550 (Sen. Underwood). No consensus was reached. This dispute sheds no light whatsoever on whether Congress intended the RLA *sub silentio* to overrule the broad immunity provisions in the consolidation section of the ICA, adopted only six years earlier.

Second, the court quoted out of context a portion of the Senate report on the bill that became the RLA, in which the committee members expressed "fundamental objection to making changes of a substantive nature in the agreement which the parties had reached". *Brotherhood of Ry. Carmen*, 880 F.2d at 570; Pet. App. 18a. The reference in S. Rep. No. 606, 69th Cong., 1st Sess. 6 (1926), to the "agreement" is not, as the court implied, to rail collective bargaining agreements but to the proposed bill itself. *See International Ass'n of Machinists v. Street*, 367 U.S. at 758; *Texas & N.O. R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 563 n.2 (1930); *see also* H.R. Rep. No. 328, 69th Cong., 1st Sess. 1 (1926) (emphasis added) ("[The bill] represented the *agreement* of railway managements operating over 80 per cent of the railroad mileage and labor organizations representing an overwhelming majority of the railroad employees."). *See generally Railway Employes' Dep't v. Hanson*, 351 U.S. at 240 (Frankfurter, J., concurring).

Accordingly, nothing in the RLA or its legislative history indicates that Congress intended that act, or collective bargaining agreements arising thereunder, to be



exempted from the immunity provisions of the ICA. Indeed, the absence of an affirmative exception for such obligations must reflect Congress' general understanding that the passage of the RLA did not modify the authority conferred under the ICA in the Transportation Act of 1920.

### C. Unsuccessful Efforts to Amend the ICA (1928-1930)

Legislative efforts by rail labor in the years immediately following the enactment of the RLA further demonstrate that the RLA's passage did not limit the immunity conferred by the ICA on consolidating rail carriers.

In 1928 Congress considered, but did not enact, legislation to change the ICA's consolidation provisions. The rail labor representative who participated in those proceedings informed the House Committee on Interstate and Foreign Commerce of a resolution adopted by the Brotherhood of Railroad Trainmen ("BRT") calling upon Congress to require that "carriers be consolidated in such a manner that will safeguard to the greatest extent the seniority, contractual and other rights of the employees on the properties." The resolution noted that BRT had collective bargaining agreements with approximately 215 railroads and terminal companies and that these agreements covered working conditions, rates of pay, and seniority rights. The resolution stated, "[I]t is necessary that in any consolidations these agreements shall not be invalidated" and that "[i]t would be a serious mistake to permit any consolidations which would in any way take from our men seniority earned, in many instances, by a lifetime of employment." *Hearings on H.R. 5641 Before the House Comm. on Interstate and Foreign Commerce*, 70th

Cong., 1st Sess. 336-37 (1928). The resolution contained no reference to the RLA and no suggestion that carriers could implement ICC-approved consolidations only after modifying the seniority terms and other provisions in collective bargaining agreements through the RLA bargaining procedures. Indeed, implicit in the resolution was the recognition that carriers could engage in consolidation transactions without regard to the provisions in collective bargaining agreements as a result of the immunity provisions of the ICA.

In April, 1930, at the outset of the Depression, the Senate considered a joint resolution that would have suspended the authority of the ICC to approve rail consolidations or unifications. The proposed resolution noted that rail consolidations and unifications "inevitably . . . result in losses of employment to railroad employees" and would have prohibited such transactions until permanent legislation could be enacted, *inter alia*, "to check unnecessary uncompensated losses to rail employees." *Hearings on S.J. Res. 161 Before the Senate Comm. on Interstate Commerce*, 71st Cong., 2d Sess. 2 (1930) ("*1930 Hearings*").

Several rail labor witnesses testified concerning the effects prior ICC-approved consolidations had had on rail employees and the working conditions and other terms embodied in their collective bargaining agreements.[37]

---

[37] For example, union chairmen on the Reading Co. System submitted a letter protesting the proposed consolidation of the Reading and the B & O:

> [I]f this merger or consolidation goes through as planned it will affect our men very seriously as it will not only change our working conditions and rules but we believe, in many cases will change our

(Continued on following page)



William N. Doak, National Legislative Representative of the BRT, presented the Senate Committee with a statement issued by the Railway Labor Executives' Association ("RLEA"), in which RLEA observed that prior consolidations had resulted in the movement and consolidation of terminals and other facilities with resulting losses of employment affecting over 200,000 employees. In an apparent reference to the RLA, the statement concluded:

> [We] have become convinced that neither existing law, nor any measures now under consideration by Congress provide adequate protection for the interests of either the users of transportation service, or the employees who furnish that service.

*1930 Hearings* 242. Accordingly, RLEA proposed that the ICA be amended to authorize the ICC to consider, in determining whether a proposed consolidation is in the public interest, the effects on employees and to require, as a condition of its approval, "[t]hat contractual and legal obligations to . . . employees shall be maintained".[38]

---

(Continued from previous page)

> terminals and wipe out crews and will therefore, very materially affect men with long years of service and change our entire working conditions.

*1930 Hearings* 240. The letter contained no suggestion that such changes in agreements and working conditions could be effected only through the RLA bargaining procedures.

[38] Rail labor's view that the RLA did not already adequately protect employees from changes in terms and conditions of employment resulting from carrier implementation of approved consolidations was reflected in Doak's oral testimony as well. *1930 Hearings* 242. *See also* the testimony of F.H.

(Continued on following page)

Also testifying in 1930 was Donald R. Richberg, counsel for RLEA and one of the principal draftsmen of the RLA, only four years earlier. *See Chicago & N.W. Ry.*, 402 U.S. at 576 (noting that Richberg's statements concerning the RLA "are entitled to great weight in the construction of the Act"). Richberg reported that carriers had unilaterally implemented operational changes having significant effects on rights arising under collective bargaining agreements in connection with ICC-authorized consolidations:

> [N]ow we face the consolidation issue, in connection with which we find there is going to be great dislocation of employees – the moving and shifting of men and of homes, which in many instances destroys the seniority privilege which has been built up over a period of years, a privilege which is of value to the men and this tends to disorganize the morale of the forces.

*1930 Hearings* at 437-38. Nevertheless, at no point during his extended testimony did Richberg assert that such changes had violated the RLA or that carriers could implement such changes only after complying with the RLA bargaining procedures to change collective bargaining agreements. Senate Joint Resolution 161 did not pass.[39]

---

(Continued from previous page)

Wilson, on behalf of the Order of Railroad Conductors, and C.W. Barlow, on behalf of the Brotherhood of Railroad Trainmen, who detailed the operational changes proposed in connection with the Great Northern Pacific consolidation (including substantial shop consolidations) and the expected effects on employees. *Id.* at 261-71.

[39] As a result, the Commission continued to consider consolidation proposals under the terms of the 1920 Act. In 1932 the Commission addressed the effects of such consolidations on rail employees in *Consolidation of R.R.'s*, 185 I.C.C. 403

(Continued on following page)



Accordingly, following the passage of the RLA in 1926 neither the RLA nor collective bargaining agreements were viewed by either carriers or rail labor as standing in the way of ICC-approved consolidations. Rail union representatives recognized that carriers could be required to comply with the RLA and to observe the terms of such agreements only if the ICA immunity provisions were expressly so amended, but their efforts to obtain such an amendment were unsuccessful.

### D. The Emergency Railroad Transportation Act of 1933

The disastrous effects of the Great Depression on the financial strength of the nation's railroads prompted Congress to consider emergency legislation designed to foster and encourage rail unifications and consolidations that might result in substantial operating economies and efficiencies. In the spring of 1933 both houses of Congress held hearings on bills that led to the passage of the Emergency Railroad Transportation Act of 1933 ("ERTA").

The emergency provisions of S. 1580 and H.R. 5500, as initially proposed, provided for the creation of the office of Federal Coordinator of Transportation and

---

(Continued from previous page)

(1932). The Commission placed carriers on notice that they would be expected to address the effects of proposed consolidations on their employees and that the Commission might, in appropriate cases, impose conditions on its approval to protect rail workers. *Id.* at 427. The Commission's decision contained no suggestion, however, that carriers intending to relocate or consolidate shops in connection with such a unification were required to comply with the RLA bargaining procedures before doing so.

granted the Coordinator sweeping authority to issue orders found to be in the public interest that would require carriers to avoid unnecessary duplication of services, to permit the joint use of terminals, and to engage in needed financial reorganizations. *See Hearings on S. 1580 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 1st Sess. 1-7 (1933) ("*1933 Senate Hearings*"); *Hearings on H.R. 5500 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 1st Sess. 1-7 (1933) ("*1933 House Hearings*"). In language clearly modeled after the immunity provisions of ICA § 5(8), both bills expressly provided that carriers were to be relieved from the antitrust laws "and all other restraints or prohibitions by law, State or Federal, other than such as are for the protection of the public health or safety, insofar as may be necessary to enable them" to comply with the Coordinator's orders. *See, e.g.*, S. 1580, Title I, § 10, *reprinted in 1933 Senate Hearings* 5. However, unlike ICA § 5(8), both bills contained the following exception to the general immunity provision:

> *Provided, however,* That nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or *the duties and obligations imposed* thereunder or *through contracts entered into in accordance with the provisions of said Act.*[40]

---

[40] Notwithstanding this proposed language, rail labor, through Donald Richberg, vigorously opposed the proposed legislation and offered numerous suggested amendments, many of which were incorporated in the final act. Richberg proposed, *inter alia*, that Title I, § 7 of the bills be amended expressly to require carriers to comply with the RLA bargaining procedures in implementing approved consolidations. *1933 Senate Hearings* 85.

Congress ultimately adopted modified versions of a number of Richberg's proposed amendments. In particular, in Title

(Continued on following page)



This immunity provision, including the express exception for the RLA and collective bargaining agreement obligations, was enacted in Title I, § 10(a) of ERTA. 48 Stat. 215; Pet. App. 118a. Thus, Congress expressly provided that the general supersession of federal law protecting carrier compliance with Coordinator orders did not apply to the RLA "or the duties and obligations imposed . . . through contracts entered into in accordance with the provisions of said Act."

Congress amended certain of the permanent consolidation provisions of ICA § 5 in Title II of ERTA, which resulted in the renumbering of the general immunity provision from § 5(8) to § 5(15). 48 Stat. 219; Pet. App. 119a. In sharp contrast to ERTA's temporary provisions in Title I, Congress did *not* add a proviso excepting the RLA or collective bargaining agreements from the scope of the ICA's general rail consolidation immunity language.[41]

---

(Continued from previous page)

I, § 7(e) of the act Congress reimposed the RLA on all rail carriers:

> Carriers, whether under control of a judge, trustee, receiver, or private management, shall be required to comply with the provisions of the Railway Labor Act. . . .

48 Stat. 214. Richberg's proposed language prohibiting carriers from issuing bulletins or orders changing existing contracts or working conditions without first complying in full with the RLA was not, however, enacted.

[41] Congress similarly provided in Title I, § 11 of ERTA, 48 Stat. 215, that a rail carrier consolidating under the auspices of the Federal Coordinator was not relieved from "any contractual obligation which it may have assumed, prior to the enactment of this Act, with regard to the location or maintenance of offices, shops, or roundhouses at any point." No similar

(Continued on following page)

Thus, Congress provided in ERTA that carriers would be required to comply with the RLA and obligations in collective bargaining agreements in carrying out consolidations during ERTA's emergency period[42] but that, following its expiration, rail carriers would once again be relieved of all "restraints or prohibitions by or imposed under authority of law, State or Federal" without limitation.[43] With ERTA's expiration in 1936 went the only

---

(Continued from previous page)

exception was enacted in the permanent ICA revisions contained in ERTA Title II. In *Texas v. United States*, 292 U.S. at 534, this Court placed great weight on this distinction: "The insertion of the provision in Title I, with its restricted application, and the omission of a similar provision from Title II, indicate an intentional distinction."

[42] ERTA's emergency provisions were initially enacted for only a one-year period. 48 Stat. 217. They were subsequently extended by Presidential proclamation for two additional years into 1936.

[43] The ICC continued to consider consolidation applications that predated ERTA. In *St. Paul Bridge & Term. Ry. Control*, 199 I.C.C. 588 (1934), the Commission's Fourth Division approved the acquisition by the Chicago Great Western Railroad Company of control by lease of the properties of the St. Paul Bridge & Terminal Company and the St. Paul Union Stockyards Company. Rail union representatives appeared at the hearing and actively opposed the application. In its decision, the Commission referred to its 1932 warning in *Consolidation of Railroads* that it might impose protective conditions in appropriate cases and concluded that special protections for the seniority of affected employees should be imposed. *St. Paul Bridge*, 199 I.C.C. at 596-97. Significantly, the Commission in *St. Paul Bridge* implicitly recognized that the applicant carrier would have been able to change the seniority rights of the terminal company employees as a result of the Commission's approval of the transaction, but for the condition it imposed.



enacted savings provision for collective bargaining agreements.

### E. The Transportation Act of 1940

Congress considered omnibus transportation legislation once again in 1939 and 1940, and the effects of rail consolidations on rail employees were addressed at length. H.R. 2531, supported by Federal Railroad Coordinator Eastman and introduced by Representative Clarence Lea, Chairman of the House Committee on Interstate and Foreign Commerce, included language modeled after Title I, § 10(a) of ERTA that would have expressly excepted the RLA and collective bargaining agreements from the ICA's general grant of immunity.[44] The bill ultimately passed by Congress contained no such immunity exception.

Thus, the 1940 Act made no changes of substance to the ICA immunity provisions. The ICA continued generally to immunize consolidating carriers from the antitrust laws and "all other restraints, limitations, and prohibitions of law, Federal, State, or municipal." ICA § 5(11), 54 Stat. 908-09. The exception in the immunity provision for the RLA and collective bargaining agreements reached thereunder, proposed in the Lea bill and previously

---

> [44] Nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act, as amended, or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act.

H.R. 2531, § 209, *reprinted in Hearings on H.R. 2531 Before the House Comm. on Interstate and Foreign Commerce*, 76th Cong., 1st Sess., pt. 1, at 9 (1939)("1939 *House Hearings*").

adopted by Congress for a temporary period in ERTA, was not included.

Congress did enact provisions in the 1940 Act designed to protect employees affected by rail consolidations from income losses. The bill passed by the Senate and sent to the House, S. 2009, obligated the ICC, in approving rail consolidations, to impose conditions that would protect the interests of affected employees. 84 Cong. Rec. 9881 (1939). On the House floor, Rep. Vincent Harrington proposed an amendment that would have prevented the ICC from approving any rail consolidation that would result in employee layoffs or displacements or would impair the terms of existing collective bargaining agreements. The Harrington Amendment would have provided:

> That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, *or in the impairment of existing employment rights of said employees*.

84 Cong. Rec. 9882 (1939); emphasis added. The amendment was adopted by the House (*id.* at 9887) but was ultimately removed in conference.[45]

Instead, Congress in the 1940 Act obligated the ICC to impose on consolidating carriers "a fair and equitable arrangement to protect the interests of the rail employees

---

[45] Because the Harrington Amendment would have prevented the ICC from approving any consolidation that would have been inconsistent with any collective bargaining agreement or that would have resulted in the displacement of any employees, it "threatened to prevent all consolidations to which it related." *Railway Labor Exec's' Ass'n v. United States*, 339 U.S. 142, 151 (1950); *see also Nemitz*, 436 F.2d at 845.



affected." ICA § 5(2)(f), 54 Stat. 906-07.[46] This obligation is now found in ICA § 11347, 49 U.S.C. § 11347. The ICC's

---

[46] George M. Harrison, a member of the Committee of Six appointed by President Roosevelt to submit recommendations concerning the general transportation situation and Chairman of the RLEA, addressed the labor protection provisions of the proposed legislation in his testimony before the Senate Committee on Interstate Commerce:

> Now, we realize that to the extent there are unifications made and to the extent that they can be shown to be in the public interest, railroad labor will be adversely affected. So we say that the Interstate Commerce Commission shall have the authority – and that is in the report – to provide for reasonable provisions for the protection of labor. The Commission now has that authority, but it is disputed by the railroads. The Committee of Six agrees that labor shall be protected in those measures authorized by the Commission.
>
> . . . [W]e were of the opinion that in prescribing the protection the Commission would undoubtedly follow what seems to be generally the practice; and that is represented in an agreement that now exists between substantially all of the railroads and all of the employees' labor unions. It provides a schedule of benefits and protections.
>
> *So to that extent I think the interest of labor will be protected*, the public interest will be protected, and the opportunity to eliminate some bad situations in the railroad transportation machine will be available.

*Hearings on S. 1310, S. 2016, and S. 2009 Before the Senate Comm. on Interstate Commerce*, 76th Cong., 1st Sess. 34 (1939) ("*1939 Senate Hearings*"); emphasis added. Harrison made no reference in his testimony to the RLA or to any assertion by rail labor that ICC-authorized consolidations could be implemented only if collective bargaining agreements were modified through the RLA bargaining procedures. Indeed, in a colloquy with Senator Reed, Harrison acknowledged that rail labor's interests would be fully protected by the labor protection provisions of the proposed bill. *Id.* at 38.

labor protection conditions have provided unprecedented levels of income protection for employees affected by the implementation of an approved rail transaction. The *New York Dock* Conditions, which protect employees affected by CSXT's Waycross/Raceland shop consolidation, provide that employees dismissed (furloughed) as a result of such an operational change may receive up to six years of pay. *New York Dock Ry.*, 360 I.C.C. at 86. Employees displaced into lower paying positions are entitled to receive the difference between their protected rate of pay and their actual income for up to six years as well. *Ibid.* If employees are required to relocate their residences in order to retain a position following a consolidation, their moving expenses are paid by the carrier. *Id.* at 87. These protections are truly "unparalleled in American industry". D. J. Kozak, "Labor Protection in the Railroad Industry," in H. Northrup and P. Miscimarra (eds.), *Government Protection of Employees Involved in Mergers and Acquisitions* 499 (1989).

* * *

Congress has amply demonstrated that it knows how to exclude collective bargaining agreements and RLA bargaining procedures from the coverage of the ICA immunity provisions when such is its purpose. The rejection of such an exclusion from the permanent ICA provisions in Title II of ERTA and again in the 1940 Transportation Act is conclusive evidence that Congress intended obligations arising from such agreements and the RLA itself to fall within what has now become § 11341(a).

### IV. The Court of Appeals' Decision Will Frustrate the Achievement of the National Transportation Policy of Fostering and Encouraging Rail Consolidations

This Court has decreed that the reach of the immunity provisions in the ICA must be determined with



reference to Congress' overriding purpose: "the promotion of economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure." *Texas v. United States*, 292 U.S. at 534-35; *see also Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118, 124-25 (1948) (ICA must be interpreted in light of Congress' purpose: "the maintenance and development of an economical and efficient railroad system.").

Since the passage of the Transportation Act of 1920, a cornerstone of this nation's transportation policy has been the facilitation and encouragement of rail consolidations. *See* S. Rep. No. 1182, 76th Cong., 3d Sess., Pt. 1, at 1, and Pt. 2, at 524 (1940). As this Court explained in *United States v. Lowden*, 308 U.S. at 232, "The policy of consolidation is so intimately related to the maintenance of an adequate and efficient rail transportation system that the 'public interest' in the one cannot be dissociated from that in the other." This purpose – "to facilitate merger and consolidation in the national transportation system" – also lay behind the sweeping revision of section 5 of the ICA in the Transportation Act of 1940 (*Brotherhood of Maint. of Way Employes v. United States*, 366 U.S. 169, 173 (1961); *County of Marin v. United States*, 356 U.S. 412, 416 (1958); *Schwabacher*, 334 U.S. at 193-94), and the reforms to the ICC's consolidation procedures enacted in the Rail Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), Pub. L. No. 94-210, 90 Stat. 31. *See* S. Rep. No. 94-499, 94th Cong., 2d Sess. 20 (1975).

The uniform decisions of the courts and the Commission, which have acknowledged the Commission's authority to supersede collective bargaining agreements and the bargaining procedures of the RLA in order to ensure that Commission-approved transactions can be

implemented, are consistent with this established Congressional policy. These decisions have recognized that in appropriate cases it may be necessary to supersede agreement provisions that would otherwise stand in the way of the implementation of rail consolidations found to be in the public interest and that requiring compliance with the bargaining procedures of the RLA would, as a practical matter, prevent those transactions. *See, e.g., Brotherhood of Loc. Eng'rs v. Chicago & N. W. Ry.*, 314 F.2d at 431 (RLA, if it were applicable, would "threaten to prevent many consolidations" because under RLA "it is possible for either party to completely block any change in working conditions"); *Nemitz*, 436 F.2d at 845 (*semble*); *see also* T. Murray, "A New Look at Rail Employee Protection, Norfolk & Western R.R. v. Nemitz: An Appraisal," 24 Case W. Res. L. Rev. 103, 125 (1972). Rail employees affected by such transactions have, instead, been provided with statutory income protection benefits of unparalleled generosity. *See* pp. 44-46, *supra*.[47]

The court of appeals' decision below, on the other hand, gave no consideration to this national transportation policy and, instead, elevated rail labor's interests in enforcing its members' rights under collective bargaining agreements to a position of primacy over the interests of all other members of the public (shippers, consumers, connecting railroads, etc.) in seeing that mergers and consolidations that will result in demonstrated economies and efficiencies are promptly accomplished. As a result of

[47] In addition, Orange-Book protected carmen who move from Waycross to Raceland retain their contractual entitlement to income protection for the remainder of their working lives. *See* nn.13, 18, *supra*.



this decision, rail carriers such as CSXT may be obligated to exhaust the "virtually endless" RLA bargaining procedures in order to make changes in collective bargaining agreements that will inevitably be required to merge seniority rosters and to transfer work and needed employees across former corporate boundaries, as was the case with the Waycross/Raceland shop consolidation. And, because the RLA does not require arbitration to resolve such bargaining disputes, the carriers will ultimately be faced with a strike if no agreement can be reached. *See* n.6, *supra*.

The decision of the court below has given rail labor – alone among all the constituencies whose interests are to be considered in determining whether a proposed consolidation is consistent with the public interest (ICA § 11344(b)(1)) – a virtual veto over all rail carrier consolidations. Like the Harrington Amendment, rejected by Congress during deliberations over the Transportation Act of 1940, the decision of the court of appeals "threaten[s] to prevent all consolidations." *Railway Labor Exec's' Ass'n v. United States*, 339 U.S. at 151. This is contrary to the clear intent of Congress, as embodied in the plain terms of the ICA.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

JAMES S. WHITEHEAD
*(Counsel of Record)*
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703

NICHOLAS S. YOVANOVIC
JAMES D. TOMOLA
CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202

*Attorneys for Petitioner*
*CSX Transportation, Inc.*

Date: May 25, 1990



## APPENDIX

### STATUTORY PROVISION INVOLVED

Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. § 11341(a) (1982):

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

[redacted]

[redacted] Court of the [redacted]

October Term, 1989

---

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.,
PETITIONERS

*v.*

AMERICAN TRAIN DISPATCHERS ASSOCIATION, ET AL.

---

CSX TRANSPORTATION, INC., PETITIONER

*v.*

BROTHERHOOD OF RAILWAY CARMEN, ET AL.

---

*ON WRITS OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

# BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

---


JOHN G. ROBERTS, JR.
*Acting Solicitor General*
DAVID L. SHAPIRO
*Deputy Solicitor General*
LAWRENCE S. ROBBINS
*Assistant to the Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

ROBERT S. BURK
*General Counsel*
[redacted]
*Deputy General Counsel*
JOHN J. McCARTHY, JR.
*Deputy Assistant General Counsel*
*Interstate Commerce Commission*
*Washington, D.C. 20423*

## QUESTION PRESENTED

Whether, under 49 U.S.C. 11341(a), a party that has entered into a merger approved by the Interstate Commerce Commission is exempt from the legal obligations imposed by a collective bargaining agreement, to the extent such an exemption is necessary in order to implement the merger.

TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Statutory provision involved | 2 |
| Statement | 3 |
| A. Statutory framework | 4 |
| B. Proceedings below | 7 |
| 1. No. 89-1027 | 7 |
| 2. No. 89-1028 | 11 |
| 3. The court of appeals' decision | 14 |
| Summary of argument | 18 |
| Argument: | |
| Under 49 U.S.C. 11341(a), a party that has entered into a merger approved by the Commission is exempt from any legal obligation imposed by a collective bargaining agreement, to the extent such an exemption is necessary to implement the merger | 21 |
| A. The text of Section 11341(a) makes clear that participants in an ICC-approved merger are exempt from all legal obstacles, including obligations under collective bargaining agreements, that may jeopardize the implementation of the merger | 22 |
| B. The legislative history of Section 11341(a) confirms that ICC-approved mergers are exempt from all legal obstacles, including collective bargaining agreements, that may jeopardize the implementation of the merger | 29 |
| 1. The Transportation Act of 1920 | 29 |
| 2. The Emergency Railroad Transportation Act of 1933 | 30 |

| | Page |
|---|---|
| 3. The Transportation Act of 1940 .... | 35 |
| C. The court of appeals' decision cannot be squared with the purpose of the ICA consolidation provisions ..... | 39 |
| D. The court of appeals erroneously declined to defer to the Commission's construction of Section 11341(a) ..... | 42 |
| Conclusion ..... | 44 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Aaron* v. *SEC*, 446 U.S. 680 (1980) ..... | 23 |
| *Brotherhood of Locomotive Eng'rs* v. *Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), cert. denied, 479 U.S. 829 (1986) ..... | 25 |
| *Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir.), cert. denied, 375 U.S. 819 (1963) ..... | 19, 20, 25, 26, 41 |
| *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169 (1961) ..... | 38 |
| *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969) ..... | 6, 41 |
| *Bundy* v. *Penn Cent. Co.*, 455 F.2d 277 (6th Cir. 1972) ..... | 26 |
| *Burlington Northern Inc.* v. *American Ry. Supervisors Ass'n*, 503 F.2d 58 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975) ..... | 26 |
| *Burlington Northern R.R.* v. *Brotherhood of Maintenance of Way Employes*, 481 U.S. 429 (1987) ..... | 20, 41 |
| *CSX Corp.—Control—Chessie Sys., Inc., & Seaboard Coast Line Indus., Inc.*, Finance No. 28905: | |
| (Sub-No. 1), 363 I.C.C. 521 (1980) ..... | 11, 12 |
| (Sub-No. 22) (Aug. 31, 1989) ..... | 17 |




Cases—Continued:


| | Page |
|---|---|
| *California* v. *Taylor*, 353 U.S. 553 (1957) ..... | 25 |
| *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ..... | 14-15, 21, 42, 43 |
| *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2477 (1989) ..... | 20, 41 |
| *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) ..... | 23 |
| *Detroit & Toledo Shore Line R.R.* v. *United Transp. Union*, 396 U.S. 142 (1969) ..... | 20, 41 |
| *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711 (1945), aff'd, 327 U.S. 611 (1946) ..... | 6, 41 |
| *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938) ..... | 27 |
| *Farmers & Mechants Bank* v. *Federal Reserve Bank*, 262 U.S. 649 (1923) ..... | 24 |
| *Fedorenko* v. *United States*, 449 U.S. 490 (1981)... | 34 |
| *Fox* v. *Standard Oil Co.*, 294 U.S. 87 (1935) ..... | 38 |
| *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322 (1978) ..... | 23 |
| *Hendrickson* v. *Apperson*, 245 U.S. 105 (1917) ... | 24 |
| *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987) ..... | 35 |
| *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) ..23, 33, 38 | |
| *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980) ..... | 33 |
| *Lawrence County* v. *Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256 (1985) ..... | 34 |
| *Lehman* v. *Nakshian*, 453 U.S. 156 (1981) ..... | 34 |
| *Local 24, Int'l Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283 (1959) ..... | 24 |
| *Louisiana* v. *New Orleans*, 102 U.S. 203 (1880) ... | 24 |
| *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944) ..... | 27, 39 |
| *Missouri Pac. R.R.* v. *United Transp. Union*, 782 F.2d 107 (8th Cir. 1986), cert. denied, 482 U.S. 927 (1987) ..... | 26 |

Cases—Continued: Page

*Nemitz* v. *Norfolk & W. Ry.*, 436 F.2d 841 (6th Cir.), aff'd, 404 U.S. 37 (1971) ..... 26
*New York Dock Ry.—Control—Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, aff'd *sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979) ..... 5, 40
*Norfolk Southern Corp.—Control—Norfolk & W. Ry., and Southern Ry.*, Finance No. 29430 (Sub-No. 1), 366 I.C.C. 173 (1982) ..... 7
*Ogden* v. *Saunders*, 25 U.S. (12 Wheat.) 212 (1827) ..... 24
*Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2584 (1989) ..... 16
*Pittston Coal Group* v. *Sebben*, 109 S. Ct. 414 (1988) ..... 27
*Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956) ..... 25
*Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. 142 (1950) ..... 35, 37
*Regan* v. *Wald*, 468 U.S. 222 (1984) ..... 27
*Russello* v. *United States*, 464 U.S. 16 (1983) ..... 33
*Schwabacher* v. *United States*, 334 U.S. 182 (1948) ..... 19, 22, 28
*Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239 (1950) ..... 25
*St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298 (1954) ..... 29, 31
*Texas* v. *United States*, 292 U.S. 522 (1934) ..... 34, 39
*Texas & N.O. R.R.* v. *Brotherhood of R.R. Trainmen*, 307 F.2d 151 (5th Cir. 1962), cert. denied, 371 U.S. 952 (1963) ..... 26, 28, 29
*Trailer Marine Transp. Corp.* v. *FMC*, 602 F.2d 379 (D.C. Cir. 1979) ..... 35
*Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979) ..... 33



Cases—Continued: Page

*United States* v. *Erika, Inc.*, 456 U.S. 201 (1982) ... 34
*United States* v. *Lowden*, 308 U.S. 225 (1939) ... 30, 39-40
*United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ..... 20-21, 42
*Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n*, 390 U.S. 261 (1968) ..... 27
*Von Hoffman* v. *City of Quincy*, 71 U.S. (4 Wall.) 535 (1867) ..... 24
*Walker* v. *Whitehead*, 83 U.S. (16 Wall.) 314 (1873) ..... 24

Statutes and regulation:

Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1466 ..... 35
Emergency Railroad Transportation Act of 1933, ch. 91, 48 Stat. 211 ..... 31
Tit. I:
§ 7(b), 48 Stat. 214 ..... 32
§ 10(a), 48 Stat. 215 ..... 31, 32
§ 11, 48 Stat. 215 ..... 34
Tit. II, § 202(15), 48 Stat. 219 ..... 33
Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* ..... 2
Interstate Commerce Act of 1887, ch. 104, § 5, 24 Stat. 380 ..... 29
Interstate Commerce Act, 49 U.S.C. 11301 *et seq.* (Ch. 113) ..... 4
49 U.S.C. 11341 ..... 17, 18, 19
49 U.S.C. 11341-11351 (1982 & Supp. V 1987) ..... 4
49 U.S.C. 11341(a) ..... *passim*
49 U.S.C. 11343 ..... 6, 14, 17
49 U.S.C. 11343(a)(1) ..... 4
49 U.S.C. 11344 (1982 & Supp. V 1987) ..... 23
49 U.S.C. 11344(b) ..... 23

Statutes and regulation – Continued: Page

49 U.S.C. 11344(b)(1) ..... 4
49 U.S.C. 11344(b)(1)(D) .....4, 23, 40
49 U.S.C. 11344(c) .....4, 5, 23, 39
49 U.S.C. 11347 (1982 & Supp. V 1987) ..... 5, 6, 11, 17, 22, 40
49 U.S.C. 11347 (Supp. V 1987) .....6, 36, 40
Norris-LaGuardia Act, 29 U.S.C. 101 *et seq.* ..... 26
Railway Labor Act, 45 U.S.C. 151 *et seq.* ..... 3, 19
45 U.S.C. 152 First ..... 25
45 U.S.C. 152 Second ..... 20, 41
45 U.S.C. 152 Seventh .....20, 25, 41
45 U.S.C. 155 First ..... 20, 41
45 U.S.C. 156 .....6, 20, 25, 41
45 U.S.C. 157 .....6, 20, 41
45 U.S.C. 160 ..... 20, 41
Transportation Act of 1920, ch. 91, 41 Stat. 456 ... 29
§ 407, 41 Stat. 480 ..... 29
41 Stat. 481 (§ 5(4)) ..... 30
41 Stat. 482 (§ 5(8)) .....15, 19, 30, 31-32, 33, 35
§ 408, 41 Stat. 482 ..... 29
Transportation Act of 1940, ch. 722, 54 Stat. 899:
§ 7, 54 Stat. 905 ..... 28, 35
54 Stat. 906-907 (§ 5(2)(f)) ..... 35-36
54 Stat. 908-909 (§ 5(11)) ..... 28, 35
28 U.S.C. 1254(1) ..... 2
28 U.S.C. 2342 ..... 23
28 U.S.C. 2350 ..... 2
Proclamation No. 2081, 48 Stat. 1740 (1934) ..... 31
77 Cong. Rec. 4859 (1933) ..... 31
79 Cong. Rec. 9346 (1935) ..... 31
84 Cong. Rec. 9882 (1939) ..... 37





Miscellaneous: Page

86 Cong. Rec. (1940):
pp. 5879-5880 ..... 38
p. 5886 ..... 38
p. 10,194 ..... 38
p. 11,766 ..... 38
p. 12,290 ..... 38
H.R. Conf. Rep. No. 2016, 76th Cong., 3d Sess. (1940) ..... 38
H.R. Rep. No. 193, 73d Cong., 1st Sess. (1933) ... 31
H.R. Rep. No. 1395, 95th Cong., 2d Sess. (1978) .. 35
L. Lecht, *Experience Under Railway Labor Legislation* (1955) ..... 30
S.J. Res. 112, 74th Cong., 1st Sess. (1935) ..... 31
S. Rep. No. 87, 73d Cong., 1st Sess. (1933) .....31, 32-33
Staff of House Legislative Comm. on Interstate Commerce Commission, 76th Cong., 3d Sess., *Omnibus Transportation Legislation* (House Comm. Print 1940) ..... 37

# In the Supreme Court of the United States

OCTOBER TERM, 1989

---

No. 89-1027

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL., PETITIONERS

*v.*

AMERICAN TRAIN DISPATCHERS ASSOCIATION, ET AL.

---

No. 89-1028

CSX TRANSPORTATION, INC., PETITIONER

*v.*

BROTHERHOOD OF RAILWAY CARMEN, ET AL.

---

*ON WRITS OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

**BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS**

---

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 880 F.2d 562.[1] The court of appeals' order of September 29, 1989 (Pet. App. 27a-28a), amending its prior opinion, is unreported. The opinion of the Interstate Commerce Commission in No. 89-1027 (Pet. App. 29a-46a) is unreported; the Commission's opinion in

---

[1] References to "Pet. App." are to the appendix to the petition in No. 89-1027.

No. 89-1028 (89-1028 Pet. App. 33a-52a) is reported at 4 I.C.C.2d 641.

## JURISDICTION

The judgment of the court of appeals was entered on July 25, 1989. Petitions for rehearing in both cases were denied on September 29, 1989 (Pet. App. 49a-50a). The petitions for a writ of certiorari in both cases were filed on December 28, 1989, and were granted on March 26, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).[2]

## STATUTORY PROVISION INVOLVED

49 U.S.C. 11341(a) provides in pertinent part:

**Scope of authority**

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction * * *.

[2] Under the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*, this Court is authorized to review, on a writ of certiorari as provided by 28 U.S.C. 1254(1), "a final judgment of the court of appeals." 28 U.S.C. 2350. Although the court of appeals remanded this case to the Commission for further proceedings, we believe its decision is nonetheless "final" for purposes of Section 2350, and is therefore reviewable by this Court. We have explained our views on this point at greater length in our opening brief (at 29-30) and reply brief (at 13 & n.10) in *Sullivan* v. *Finkelstein*, No. 89-504, copies of which have been furnished to all counsel.



## STATEMENT

The Interstate Commerce Commission has broad authority to examine, condition, and approve proposed rail carrier consolidations. In the two cases presented, the Commission approved the merger of rail systems and, as a condition of its approval, imposed certain labor protective requirements, intended to soften the impact of the merger on affected employees. Some years later, the merged carriers sought to carry out the approved consolidation by integrating into a single facility services then being performed at separate outlets. Because the proposed integration entailed adverse impacts for employees, however, the respondent unions invoked their rights under existing collective bargaining agreements and requested negotiations under the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*

Reviewing the decision of arbitration committees, the Commission sustained the proposed integrations – thereby precluding enforcement of the conflicting terms of the collective bargaining agreements. The agency relied, in part, on Section 11341(a) of the Interstate Commerce Act, under which parties to an ICC-approved consolidation are exempt "from all other law, including State and municipal law, as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a). The court of appeals reversed the Commission's decision, holding that Section 11341(a) applies only to "positive enactments, not common law rules of liability, as on a contract." Pet. App. 18a. Accordingly, the court ruled, Section 11341(a) does not exempt carriers from their legal obligations under collective

bargaining agreements—including those obligations that may jeopardize implementation of an ICC-approved consolidation.

**A. Statutory Framework**

Chapter 113 of the Interstate Commerce Act (ICA, or Act), 49 U.S.C. 11031 *et seq.*, vests the Interstate Commerce Commission with exclusive and plenary jurisdiction to examine, condition, and approve rail carrier combinations, including the consolidation of two or more carriers. 49 U.S.C. 11343(a)(1). The statutory provisions grant the Commission broad authority to evaluate the effects of these transactions on interested persons and the public. See 49 U.S.C. 11341-11351 (1982 & Supp. V 1987).

Section 11344(c) provides that upon application of the parties, the Commission may conduct a proceeding and "shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest." 49 U.S.C. 11344(c). That Section identifies specific criteria to guide the Commission's consideration, including "the interest of carrier employees affected by the proposed transaction." 49 U.S.C. 11344(b)(1)(D).[3]

---

[3] Section 11344(b)(1) instructs that in situations, as here, involving the merger or control of at least two class I railroads, the Commission shall consider "at least" the following factors (49 U.S.C. 11344(b)(1)):

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.



Section 11344(c) also provides that the Commission "may impose conditions governing the transaction." 49 U.S.C. 11344(c).

Section 11347 provides that the Commission shall impose conditions to protect the interests of railroad employees who are adversely affected by an approved transaction. 49 U.S.C. 11347 (1982 & Supp. V 1987).[4] Pursuant to that authority, the Commission has formulated standard labor-protective conditions, derived from the Commission's decision in *New York Dock Ry.—Control—Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, 84-90, aff'd *sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979). The *New York Dock* conditions establish, among other things, procedures to resolve—by negotiation and, failing that, binding arbitration—any labor dispute arising from an ICC-approved railroad consolidation. Accordingly, Section 4 of the *New York Dock* conditions, 360 I.C.C. at 85, requires a "railroad contemplating a transaction which . . . may cause the dismissal or displacement of any employees, or rearrangement of forces [to] give at least ninety . . . days written notice . . ." Pet. App. 3a. Section 2, 360 I.C.C. at 84, provides that "[t]he rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . under applicable laws

---

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

[4] Among other things, Section 11347 states that "[t]he arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period)." 49 U.S.C. 11347 (1982 & Supp. V 1987).

and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements." Pet. App. 3a-4a. These conditions ensure that transactions found to be in the public interest can be consummated without labor strife by providing a "fair arrangement" (49 U.S.C. 11347 (Supp. V 1987)) for displaced employees.[5]

When the Commission has approved a transaction, the statute exempts the participants from legal obstacles that would otherwise bar or impede its implementation. Section 11341(a), the so-called immunity provision, provides that upon ICC approval of a Section 11343 transaction:

> A carrier * * * participating in that approved * * * transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction * * *.

---

[5] The conditions devised by the Commission under Section 11347 for approved transactions stand in sharp contrast to the RLA's cumbersome procedures for changing the provisions of a collective agreement. Under the RLA, an attempt to change a collective agreement results in a "major dispute." *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 723 (1945), aff'd on reh'g, 327 U.S. 661 (1946). The parties must engage in a protracted procedure to resolve their differences, which includes negotiation, mediation, and conciliation, and must consider voluntary arbitration. See 45 U.S.C. 156, 157. If the parties are unable to reach an agreement, either party may resort to economic self-help such as a lock-out or strike. See generally *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378-380 (1969).



**B. Proceedings Below**

**1. *No. 89-1027***

a. In March 1982, the ICC approved the application of NWS Enterprises, Inc. (now Norfolk Southern, or NS), a holding company, to acquire control of two rail carriers, petitioners Norfolk and Western Railway Company (N & W) and Southern Railway Company (Southern). See *Norfolk Southern Corp.—Control—Norfolk & W. Ry. and Southern Ry.*, Finance No. 29430 (Sub-No. 1), 366 I.C.C. 173 (1982). In its order approving control, the ICC imposed the standard *New York Dock* labor-protective conditions. Pet. App. 6a. Although the Commission recognized that it was "possible that further displacement [of employees] may arise as additional coordinations occur," it concluded that "the minimum statutory protection of *New York Dock* is appropriate for the protection of applicants' employees affected by this proceeding." 366 I.C.C. at 230-231.

Respondent American Train Dispatchers' Association (the Association) was the bargaining representative of certain N & W employees responsible for "power distribution"—the process by which locomotives are assigned to particular trains and facilities. On September 12, 1986, petitioners informed the Association that they intended to consolidate all power distribution for the combined Norfolk Southern operation by transfering the work performed at the N & W power distribution center in Roanoke, Virginia, to the Southern center in Atlanta, Georgia.[6] The carriers proposed that affected N & W

---

[6] Petitioners asserted that as a result of the proposed consolidation, "power distribution functions would be aligned along * * * [a] more efficient east-west division of the combined system," thus permitting "substantial cost savings because fewer locomotives will be needed and

employees would be "given consideration" for employment in new positions as superintendents in Atlanta. Superintendents in Atlanta were considered management, however, and were therefore not covered by any collective bargaining agreement. Pet. App. 6a-7a, 30a-31a.

The Association thereafter sought to negotiate the terms under which the proposed transfer would be implemented. The negotiations foundered, however, over the Association's contentions that (1) the carriers' proposal involved a change in an existing collective agreement and was subject to mandatory bargaining under the RLA; (2) the carriers were required to preserve the right of the transferred employees to representation under the RLA; and (3) the affected employees were entitled to retain their rights, including their seniority rights, under the collective bargaining agreement with N & W. The carriers then asked the National Mediation Board to appoint an arbitrator pursuant to Section 4 of the *New York Dock* conditions. Pet. App. 7a.

The dispute thereafter came before a three-member arbitration committee, which ruled in favor of the carriers on each of the disputed issues. See J.A. 8-32. The committee first found that the proposed consolidation was part of the control transaction approved by the ICC. J.A. 15-16. It noted that when the Commission approved the underlying merger, the agency had expressly anticipated the possibility of "additional coordinations" that would further "the goal of greater efficiencies" J.A. 15. The committee concluded that the proposed transfer of work to Atlanta met that criterion. J.A. 15-16.[7] Relying on prior

---

the remaining locomotives can be used more efficiently." Pet. App. 31a-32a.

[7] In particular, the committee observed that during the hearing it had received testimony indicating "that there will be substantial saving



ICC decisions (J.A. 17-19), the committee also held that it had the authority to override—to bar enforcement of—any provision of a collective bargaining agreement or of the Railway Labor Act that impeded implementation of the ICC-approved merger between N & W and Southern. Finally, the committee concluded that the transferred employees could not retain their rights under the collective bargaining agreement. Pet. App. 7a.

The carriers thereafter effected the coordination of work and offered superintendent positions to all nine active and three furloughed N & W employees. Nine of the twelve accepted, two declined, and one retired. There were no displacements of other employees. Pet. App. 33a.

b. The Commission affirmed by a divided vote. Pet. App. 29a-46a. It explained that "[i]t has long been the Commission's view that private collective bargaining agreements and RLA provisions must give way to the Commission-mandated procedures of section 4 [of the *New York Dock* conditions] when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission." *Id.* at 33a. Accordingly, the Commission stated, "the panel correctly found * * * that * * * the compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements." *Id.* at 35a.

---

to the combined carrier through the planned coordination, both in capital costs since fewer locomotives will be needed and also since operating costs of the remaining locomotives may be reduced through their more efficient utilization throughout the entire system." J.A. 16. See also J.A. 10 (testimony of J.R. Martin, Senior Vice President, Transportation Planning, Southern Railway Company).

The ICC also held that, because the proposed transfer was incident to the merger approved by the Commission, it was "immunized from conflicting laws by section 11341(a)." Pet. App. 35a.[8] The Commission explained that "[t]o the extent that existing working conditions and collective bargaining agreements conflict with a transaction which [the ICC] ha[s] approved, those conditions and agreements must give way to the implementation of the transaction." *Id.* at 36a. "Such a result is essential," the ICC noted, "if transactions approved by [the agency] are not to be subjected to the risk of non-consummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transactions." *Id.* at 34a. Were the law otherwise, the Commission added, there would be "no assurance that the approved transaction will ever be effected." *Ibid.*

Finally, the Commission upheld as appropriate the decision to override the collective bargaining agreement and the RLA provisions. Reviewing the record, the Commission noted that "[i]mposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers'

[8] The Commission noted that although "[t]he proposed transfer" was "not specifically mentioned in *Norfolk Southern Control*," it was nonetheless "one of the future coordinations and public benefits expected to flow from, and is therefore part of, the control transaction that [the Commission] approved. Indeed, the arbitration panel found that coordination of locomotive power is precisely the type of action that might reasonably be expected to flow from the control transaction." Pet. App. 35a.



underlying purpose of integrating the power distribution function." [9] Pet. App. 37a.[10]

2. *No. 89-1028*

a. On September 23, 1980, the ICC approved a proposal under which CSX Corporation would acquire control of two other holding companies: (1) the Chessie System, Inc., whose principal railroad subsidiaries were the Chesapeake and Ohio Railway Company and the Baltimore and Ohio Railroad Company; and (2) Seaboard Coast Line Industries, Inc., the parent of the Seaboard Coast Line Railroad (later to become petitioner, CSX Transportation, Inc.). See *CSX Corp.—Control—Chessie Sys., Inc., & Seaboard Coast Line Indust., Inc.*, Finance No. 28905 (Sub-No. 1), 363 I.C.C. 521 (1980). As required by Section 11347 of the Act, the Commission imposed a standard set of labor protective conditions, derived from *New York Dock*. Pet. App. 3a-4a; 89-1028 Pet. App. 54a. The Commission recognized that "as the two systems mesh their operations, additional coordinations may occur that could lead to further employee displacements." 363 I.C.C. at 589. Nevertheless, refusing to accede to the unions' request for more favorable protections, the Commission determined that "the standard conditions will adequately protect those employees now identified as affected by the

[9] In denying the Association's earlier application to stay the Committee's arbitration award, the Commission had also noted that "the record shows that N & W and Southern will realize a $26 million capital investment saving and an annual $2 million operating expense saving, exclusive of labor cost savings, from the coordination." J.A. 37.

[10] Commissioner Lamboley dissented. Pet. App. 42a-46a. In his view, the case should have been remanded to the arbitration panel for a determination of whether, and to what extent, the provisions of the collective bargaining agreement could have been accommodated, consistent with the goal of completing the approved transfer.

consolidation as well as those who may be affected in the future, but are not now identified specifically." *Ibid.*

At the time of the consolidation, Chessie operated a heavy freight car repair shop in Raceland, Kentucky, and Seaboard operated a similar shop in Waycross, Georgia. On August 29, 1986, CSX, invoking Section 4 of the *New York Dock* conditions, notified the respondent labor organizations that it intended to close the Waycross shop and to transfer the employees and the work from that shop to the Raceland shop. The transfer was to result in a net decrease in available jobs at the two shops. Pet. App. 4a; 89-1028 Pet. App. 55a.

Relations between CSX and the unions representing its employees were governed at the time by a collective bargaining agreement known as the "Orange Book," negotiated to implement a previously authorized merger. See 89-1028 Pet. App. 54a-55a. The Orange Book provided, among other things, that the carrier would employ each covered employee for the remainder of his working life, and that no covered employee "shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment." Pet. App. 4a. In return for that job protection, the Orange Book gave the carrier the right "to transfer the work of the employees protected [t]hereunder throughout the merged or consolidated [*i.e.*, Seaboard] system * * *." *Ibid.*

Once notified of the proposed transfer of work and employees, respondent Brotherhood of Railway Carmen (the Brotherhood) attempted to negotiate an implementation agreement on behalf of the affected employees. Negotiations foundered, however, due to disagreements about (1) whether the displaced Waycross employees would retain their Orange Book rights; and (2) whether the



proposed transfer would result in a change of working conditions and, if so, whether CSX would be required to comply with the Railway Labor Act before effecting such a change. CSX invoked arbitration under the *New York Dock* conditions, and the matter came before a three-member arbitration panel. Pet. App. 4a-5a.

The arbitration panel concluded that the Orange Book prohibited the proposed transfer of work and employees. 89-1028 Pet. App. 82a-83a. The panel stated, however, that as a "quasi-judicial extension of the ICC" (*id.* at 80a), it had the authority to override any Orange Book or RLA provision that impeded the transfer decision. The panel then held that (1) it would override the Orange Book prohibition on the transfer of work, but not on the transfer of employees, and (2) it would exempt CSX from the RLA insofar as the statute might require the carrier to bargain before unilaterally changing the Orange Book with respect to the transfer. Pet. App. 5a-6a.[11]

b. By a divided vote, the Commission affirmed in part and reversed in part. 89-1028 Pet. App. 33a-52a. The Commission agreed that the arbitrators were "empowered to override collective bargaining rights, such as those in the Orange Book, and RLA rights in formulating the implementing agreement." *Id.* at 43a. But it rejected the panel's refusal to permit the transfer of employees to Raceland. The Commission reasoned that if, as the panel had found, the Orange Book prohibits such a transfer of employees, then to enforce the Orange Book in this setting

---

[11] The arbitrators also found that although the proposed consolidation of freight car repair facilities "was not expressly and specifically presented to the Commission during administrative proceedings culminating in approval of the control application," the transaction was nevertheless an "action taken pursuant to authorizations of th[e] Commission," within the meaning of *New York Dock*. 89-1028 Pet. App. 78a.

would "serve[ ] as an impediment to implementation of a transaction authorized by the Commission." *Id.* at 44a. The Commission also found that, in light of the positions available at Raceland and the number of Waycross employees eligible for those positions, "[i]mposition of an Orange Book employee exception would effectively prevent implementation of the proposed transaction." *Id.* at 45a.[12] The Commission accordingly reversed the arbitrators' decision "to the extent it holds that CSX may not require transfer of [Seaboard] employees as well as work from Waycross to Raceland." *Id.* at 44a.[13]

### 3. *The Court of Appeals' Decision*

The court of appeals considered the two cases together and reversed and remanded. Pet. App. 1a-26a. The court held that Section 11341(a) of the Act does not authorize the Commission to relieve a party to a Section 11343 transaction of contractual obligations that impede implementation of the transaction.[14] The court explained that the

[12] In particular, the Commission noted that CSX "propose[d] to establish a total of 107 positions at Raceland, including 86 carmen positions. Of the 86 Waycross carmen who are eligible for those positions, 57 are entitled to Orange Book protection." If the arbitrators' decision prevailed, the Commission observed, "those 57 Waycross employees (over 55 percent of the proposed Raceland work force) [could] refuse to accept positions at Raceland." 89-1028 Pet. App. 44a-45a.

[13] Commissioner Lamboley dissented. 89-1028 Pet. App. 46a-52a. He expressed "substantial doubt" that the proposed transfer of work and employees was a transaction authorized by the Commission's prior approval of the control by CSX of Chessie and Seaboard. *Id.* at 46a. He also rejected the proposition that "*any* conflict, regardless of origin or degree, is an impediment pre-empted by [Interstate Commerce Act] provisions." *Id.* at 49a.

[14] The court of appeals acknowledged that the rule of deference articulated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "applies to the ICC's reading of the statute that it is charged with implementing." Pet. App. 11a. The court stated, however, that deference may be afforded only where a court determines, "based upon the language of the statute and the 'traditional tools of statutory construction,' * * * that Congress has not 'directly spoken to the precise question at issue.' " *Ibid.*



statute does not expressly state that the ICC may override contracts, "nor has it ever, in any of the various iterations since its initial enactment in 1920, included even a general reference to 'contracts,' much less any specific reference to [collective bargaining agreements]." Pet. App. 12a. The court stated that the Commission's contrary view found "no support in the language of the statute," explaining that the phrase "all other law" in Section 11341(a) cannot be read to include "all legal obstacles." Pet. App. 12a.

The court also found no evidence in the legislative history to support the Commission's construction of Section 11341(a). Pet. App. 13a-19a. Looking solely to the Transportation Act of 1920, ch. 91, § 407, 41 Stat. 482, the court stated that Congress had "focused nearly exclusively * * * on specific types of laws it intended to eliminate—all of which were positive enactments, not common law rules of liability, as on a contract." Pet. App. 18a. The court also discerned in the legislative history "a healthy respect for privately negotiated contracts." *Ibid.* "And never, on the several occasions when Congress has revisited the immunity provision, has it either broadened that provision so as to reach 'all legal obstacles' to an ICC-approved transaction, or acted more specifically to bring 'contracts' or 'collective bargaining agreements' within the reach of the statute." *Id.* at 18a-19a.

The court next "decline[d] to address the question" (Pet. App. 19a) whether Section 11341(a) may operate to override provisions of the RLA. Observing that the Commission's present position with respect to the RLA "depart[s]

from its earlier precedent" (Pet. App. 23a), the court directed the agency on remand either to "provide an explanation for its new position on that issue, or adhere to its prior position." *Id.* at 25a. The court also explained that, "[i]n light of [its] holding that § 11341(a) does not empower the ICC to override a [collective bargaining agreement], it is unclear what are the consequences, if any, of its rulings that the carriers need not comply with the RLA." *Id.* at 23a. Because of the "uncertainty as to the effects of [the] ruling on the continued vitality of the disputes," the court decided to remand the RLA issue to the Commission "to determine whether there is any live RLA issue remaining." *Id.* at 25a.

Finally, the court "decline[d] to address either the ICC's theory that the labor protective conditions required by § 11347 of the Act are exclusive, or its related assertion * * * that § 4 of the *New York Dock* conditions gives the arbitration committee the 'absolute right' to effectuate the transfer of employees, and to override any contrary provisions of a [collective bargaining agreement]." Pet. App. 25a. In the court's view, the Commission had not raised those claims in its court of appeals' brief. "In any event," the court concluded (*id.* at 26a), it is "best for the ICC, if it has not abandoned its § 11347 and § 4 rationales altogether, to reconsider them in the first instance in light of" this Court's intervening decision in *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2584 (1989).

4. Petitioners filed petitions for rehearing in the court of appeals. The Commission also filed a "limited" petition for rehearing. In it, the agency advised the court of its "intention to reopen these proceedings and to promptly issue a comprehensive decision on remand addressing issues [the agency] believe[s] the court directed [it] to reconsider and those left open for resolution in further proceedings." The



Commission accordingly "requested that the court refrain from ruling on [the agency's] petition for rehearing until [the agency has] issued [its] decision on remand." *CSX Corp.—Control—Chessie Sys., Inc. & Seaboard Coast Line Indus., Inc.*, ICC Finance No. 28905 (Sub-No. 22) (Aug. 31, 1989) [hereafter, ICC Finance No. 28905].

By order served September 20, 1989, the Commission "reopen[ed] the[ ] proceedings so that [it] could address and explain in detail [its] views on the issue specifically remanded; *i.e.*, whether the provisions of 49 U.S.C. 11341(a) operate to override the provisions of the Railway Labor Act (RLA), as well as on the general issues raised in these proceedings, particularly the impact of our approval of a transaction under 49 U.S.C. 11343 *et seq.* and imposition of our standard labor conditions upon the parties' rights and remedies under the RLA and with respect to existing collective bargaining agreements." ICC Finance No. 28905. The Commission added that "[i]n light of the importance of the legal issues involved and [its] intention to conduct a comprehensive examination of [its] authority under 49 U.S.C. 11341, 11343, and 11347, etc., and the labor conditions [it] ha[s] customarily imposed in approving railroad consolidations," the agency was therefore "seeking further comment by the parties to these proceedings as well as any other interested parties." *Ibid.*

On September 29, 1989, the court of appeals denied petitioners' petitions for rehearing (Pet. App. 50a) and issued an order stating that the Commission's petition would be "deferred pending release of the ICC's decision on remand." Pet. App. 53a-54a. Moreover, the court amended its decision to remand only the "records," thus retaining jurisdiction over the case. Briefs by interested parties have now been filed with the Commission, and the agency entertained oral argument on January 4, 1990.

## SUMMARY OF ARGUMENT

The Interstate Commerce Act gives the Interstate Commerce Commission broad authority to approve proposed railroad consolidations that the Commission finds, after appropriate proceedings, to be consistent with the public interest. When such a transaction has been approved, the ICA exempts each participating carrier from "all other law, including State and municipal law, as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a). Construing Section 11341(a) in the present case, the Commission determined that petitioners could proceed with their proposed transactions, notwithstanding any conflicting obligations under collective bargaining agreements executed with the private respondents.

The court of appeals reversed, holding that the phrase "all other law" in Section 11341(a) refers only to "positive enactments, not common law rules of liability, as on a contract." Pet. App. 18a. It is that ruling, and only that ruling, that is before the Court at this point, since all other questions remain for consideration by the Commission and any later judicial review.

With respect to that ruling—involving the applicability of Section 11341 to legal obligations under a collective bargaining agreement—the text, history, and purpose of Section 11341(a) confirm the broader construction adopted by the Commission. Since the Commission is the agency charged with the enforcement of the ICA, its reasonable interpretation of the statute should have been upheld.

A. The text is dispositive. Section 11341(a) exempts a covered carrier from "all other law * * * as necessary to let that person carry out the transaction." The exemption from "all other law" is easily sufficient to embrace those laws governing the obligations of parties to contracts in



general, and to collective bargaining agreements in particular. Contracts are creatures of law, and they are rendered enforceable through a regime of state and federal common and statute law. Indeed, this Court in *Schwabacher* v. *United States*, 334 U.S. 182 (1948), recognized that the "law" referred to in Section 11341 includes the law under which contractual obligations are enforced.

The contracts involved in this case—collective bargaining agreements in the railroad industry—are enforceable under the Railway Labor Act, 45 U.S.C. 151 *et seq.*, which "[u]nquestionably * * * is a federal law" within the meaning of Section 11341(a) (*Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 314 F.2d 424, 432 (8th Cir.), cert. denied 375 U.S. 819 (1963)). Thus the long-standing and widespread recognition by the lower courts that Section 11341(a) immunizes ICC-approved transactions from the operation of the RLA where necessary to implement the transaction is both correct and dispositive of the question presented here.

B. The legislative history of Section 11341(a), and of the consolidation provisions generally, confirms the meaning of the text. Section 11341(a) derives from a provision contained in the Transportation Act of 1920, which was intended to foster railroad mergers generally, and which therefore broadly exempted carriers from "all other restraints or prohibitions by law." § 407, 41 Stat. 482. What is more, on two occasions—in 1933, and again in 1940—Congress expressly *refused* to narrow the scope of the ICC's consolidation authority by carving out a special exception for obligations arising from labor agreements.

C. The court of appeals' conclusion—according to which collective bargaining agreements are fully enforceable under the RLA, even when they are in conflict with the terms of an ICC-approved consolidation—cannot

be squared with the evident purpose of the consolidation provisions: to foster the merger process while accommodating, to the fullest extent possible, the competing claims of affected employees. If, as the court of appeals supposed, employees may enforce conflicting contractual rights under the RLA, ICC-approved transactions would "be subjected to the risk of non-consummation." Pet. App. 34a. By proposing a change in the existing collective bargaining agreement, the transaction would thereby provoke a "major" dispute under the RLA. See *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2477, 2480 (1989). Where such a dispute is involved, the parties must maintain the status quo while engaging in a lengthy process of negotiation, mediation, and possibly review by a Presidential Emergency Board. *Detroit & Toledo Shore Line R.R.* v. *United Transp. Union*, 396 U.S. 142 (1969). If that process fails to produce an agreement, each side is free to resort to strikes, lock-outs, or other forms of economic self-help calculated to achieve the desired objectives. See 45 U.S.C. 152 Second and Seventh, 155 First, 156, 157, 160; *Burlington Northern R.R.* v. *Brotherhood of Maintenance of Way Employes*, 481 U.S. 429, 444-445 n.10 (1987). And "[s]ince there is no mechanism * * * for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected." Pet. App. 34a. If applicable, the procedures for modifying collective agreements under the RLA would therefore "threaten to prevent many consolidations." *Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 314 F.2d at 431.

D. "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985). In light of the text, history, and purpose of Section 11341(a), the Commission's conclusion—that "all other law" includes the law governing the enforcement of collective bargaining agreements—is entitled to deference and should be upheld.



The court of appeals acknowledged those principles (Pet. App. 11a), but declined to defer to the Commission's construction of the statute. Yet even accepting the court's view (as we do not)—that Congress did not directly address the precise question at issue—the court should have asked only whether the Commission's construction of the statute was "a reasonable one." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984). In our view, the Commission's judgment is plainly reasonable, and the court of appeals erred in "substitut[ing] its own construction of a statutory provision for a reasonable interpretation * * * of an agency" (*id.* at 844).

## ARGUMENT

### UNDER 49 U.S.C. 11341(a), A PARTY THAT HAS ENTERED INTO A MERGER APPROVED BY THE COMMISSION IS EXEMPT FROM ANY LEGAL OBLIGATION IMPOSED BY A COLLECTIVE BARGAINING AGREEMENT, TO THE EXTENT SUCH AN EXEMPTION IS NECESSARY TO IMPLEMENT THE MERGER

The broad ruling of the court of appeals—that the exemptions provided by Section 11341(a) do not apply to those laws governing the enforcement of contractual obligations—raises only one important but limited question for review. If this Court determines, as we believe it should, that this broad ruling was in error, the judgment below should be reversed and the case remanded for consideration of any remaining questions, including those

that are now pending before the Commission and that may be raised in subsequent proceedings for judicial review.[15]

In reaching its conclusion, the court of appeals, in our view, attempted to separate the inseparable—holding that contracts are not included among the laws referred to in Section 11341(a), but at the same time "declin[ing] to address" the question whether Section 11341(a) may operate to override provisions of the RLA. Pet. App. 19a. Contracts derive their effectiveness and enforceability from a regime of state and federal common and statute law, and the collective bargaining agreements at issue here depend for their effectiveness and enforceability on the RLA. Just as this Court held in *Schwabacher* v. *United States*, 334 U.S. 182 (1948), that contractual obligations enforceable under state law are subject to the exemption conferred by Section 11341(a), so the Court should hold in this case that contractual obligations enforceable under the RLA are subject to the same exemption. This result, we submit, is compelled by the text and history of Section 11341(a) and of related provisions.

**A. The Text of Section 11341(a) Makes Clear That Participants In An ICC-approved Merger Are Exempt From All Legal Obstacles, Including Obligations Under Collective Bargaining Agreements, That May Jeopardize The Implementation of The Merger**

1. As this Court has explained many times, "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be

[15] These questions may include whether the overriding of contractual obligations was "necessary" to the implementation of the transaction within the meaning of Section 11341(a), and whether and to what extent the Commission's decision was authorized by the labor protective conditions associated with Section 11347.



regarded as conclusive." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Accord *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); *Aaron* v. *SEC.*, 446 U.S. 680 (1980); *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). The text of the ICA consolidation provisions, and of Section 11341(a) in particular, leaves no doubt that participants in an ICC-approved merger are exempt from obligations under a collective bargaining agreement that may jeopardize the implementation of the merger.

The statutory language is both clear and straightforward. Section 11344(c) provides that "[t]he Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest." 49 U.S.C. 11344(c). Section 11341(a) provides (49 U.S.C. 11341(a)):

> A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

As the statutory language indicates, the Commission must determine whether a proposed consolidation is consistent with the public interest. That determination is made on the record, after hearing the views of interested persons. See 49 U.S.C. 11344 (1982 & Supp. V 1987). It is guided by specific statutory criteria (49 U.S.C. 11344(b))—including criteria requiring specific labor protections (49 U.S.C. 11344(b)(1)(D))—and is, of course, subject to judicial review (28 U.S.C. 2342). But once the proposed transaction is approved, Section 11341(a) confers an exemption from "all other law"—an exemption of sufficient breadth

to permit the exempted party to "carry out the transaction," notwithstanding any legal obstacle.

The exemption from "all other law" is easily sufficient to embrace those laws governing the enforceability of contracts in general, and of collective bargaining agreements in particular. Contracts are voluntarily entered into, but depend for their effectiveness and enforcement on a regime of state and federal common and statute law. "The obligation of a contract," this Court has explained, "is the law which binds the parties to perform their agreement." *Hendrickson* v. *Apperson*, 245 U.S. 105, 112 (1917).[16] And the "[l]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form part of it, as fully as if they had been expressly referred to or incorporated in its terms"—a principle which "embraces alike those laws which affect its construction and those which affect its enforcement and discharge." *Farmers & Merchants Bank* v. *Federal Reserve Bank*, 262 U.S. 649, 660 (1923).[17]

Those principles apply with special force to collective bargaining agreements. "Federal law * * * create[s] the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties ma[k]e in response to that duty * * *; and federal law sets some outside limits * * * on what their agreement may provide." *Local 24, Int'l Brotherhood of Teamsters* v. *Oliver*, 358 U.S. 283, 296 (1959). And collective bargaining agreements in the

---

[16] Accord *Louisiana* v. *New Orleans*, 102 U.S. 203, 206 (1880); *Walker* v. *Whitehead*, 83 U.S. (16 Wall.) 314, 318 (1873); *Von Hoffman* v. *City of Quincy*, 71 U.S. (4 Wall.) 535, 552 (1867).

[17] Accord *Hendrickson*, 245 U.S. at 112; *Walker*, 83 U.S. (16 Wall.) at 317; *Von Hoffman*, 71 U.S. (4 Wall.) at 550; *Ogden* v. *Saunders*, 25 U.S. (12 Wheat.) 212, 231 (1827).



railroad industry are uniquely "legal" instruments: their formation, construction, and enforcement are regulated by a detailed statutory framework—the Railway Labor Act.

For example, the Railway Labor Act requires the parties to "make and maintain agreements" (45 U.S.C. 152 First) and to refrain from making changes in existing agreements, except according to the procedures established by the Act (45 U.S.C. 152 Seventh, 156). The Act "extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements." *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239, 242 (1950). The Act also "sets up machinery for conciliation, mediation, arbitration and adjustment of disputes, to be invoked if negotiations fail." *Ibid.* "[T]he federal statute is the source of the power and authority" of collective bargaining agreements, and "[a] union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it." *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225, 232 (1956). Accord *California* v. *Taylor*, 353 U.S. 553, 561 (1957).

Thus, the law that renders collective bargaining agreements in the railroad industry binding and enforceable, and that specifies the procedures for changing such agreements, is, in essence, the RLA, an Act that "[u]nquestionably * * * is a federal law" within the meaning of Section 11341(a) (*Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 314 F.2d 424, 432 (8th Cir.), cert. denied, 375 U.S. 819 (1963)). As the First Circuit recently noted, Section 11341(a) "extends to any of the statutory provisions regulating railroads, including the RLA." *Brotherhood of Locomotive Eng'rs* v. *Boston & Maine Corp.*, 788 F.2d 794, 800, cert. denied, 479 U.S. 829 (1986). "[T]o hold otherwise would be to disregard the plain language of [the statute] conferring exclusive and

plenary jurisdiction upon the ICC to approve mergers and relieving the carrier from all other restraints of federal law." *Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 314 F.2d at 431-432. Accord *Missouri Pac. R.R.* v. *United Transp. Union*, 782 F.2d 107, 111-112 (8th Cir. 1986), cert. denied, 482 U.S. 927 (1987); *Bundy* v. *Penn Cent. Co.*, 455 F.2d 277, 279 (6th Cir. 1972); *Nemitz* v. *Norfolk & W. Ry.*, 436 F.2d 841, 845 (6th Cir.), aff'd without reaching the issue, 404 U.S. 37 (1971).[18]

In short, a contractual provision has legal force only by virtue of law—in this case, the RLA. And the RLA, like any other law, is within the scope of Section 11341(a).

2. The court of appeals attempted to read Section 11341(a) more narrowly. "[D]eclin[ing] to address" the question whether Section 11341(a) applies to the RLA (Pet. App. 19a), the court sought to abstract collective agreements from their federal statutory context, and proceeded to exclude contracts generally from the scope of the Section. In the court's view, "all other law" refers only to "positive enactments, not common law rules of liability" (Pet. App. 18a). As a general proposition, that is surely mistaken; "law" is conventionally understood to include

[18] See also *Texas & N. O. R.R.* v. *Brotherhood of R.R. Trainmen*, 307 F.2d 151, 158-162 (5th Cir. 1962) (holding that the predecessor to Section 11341(a) does not preempt the Norris-LaGuardia Act, 29 U.S.C. 101 *et seq.*, or a prior collective bargaining agreement, but recognizing that under the predecessor provision the Commission has jurisdiction "to find whether certain of the union [contractual] demands are contrary to the public interest in the effectuation of the transaction" and "thereafter to prevent the enforcement" of those demands), cert. denied, 371 U.S. 952 (1963). Cf. *Burlington Northern, Inc.* v. *American Ry. Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974) (labor-protective conditions imposed as part of ICC approval of a consolidation override conflicting provisions of the RLA), cert. denied, 421 U.S. 975 (1975).



common law, as well as statutes. See *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 79 (1938). Relying on scattered portions of legislative history, however, the court below concluded that Congress had "focused nearly exclusively" on "specific types of laws it intended to eliminate"—all of which were statutes, not common law. Pet. App. 18a. As we have already shown, that inference could not sustain the result reached below, since the "law" in point here *is* a federal statute (the RLA). And as we show below, the court of appeals misread the legislative history. But in any event, as this Court has recently explained, "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Group* v. *Sebben*, 109 S. Ct. 414, 420-421 (1988). See also *Regan* v. *Wald*, 468 U.S. 222, 236-237 (1984); *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n*, 390 U.S. 261, 275 (1968). Like the statute at issue in *Pittston Coal*, Section 11341(a), with its reference to "all other law," "plainly embraces criteria of more general application." 109 S. Ct at 421. Cf. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79 (1944) (broad language of predecessor of Section 11341(a) does "not admit of nullification by reference to the varying conditions under which different types of carriers were brought within the statute's operation").

The court of appeals also surmised that to accept the Commission's construction of Section 11341(a) "would lead to most bizarre results." Pet. App. 13a. In particular, the court stated, "[u]nder the ICC's reading, it could set to naught, in order to facilitate a merger, a carrier's solemn undertaking, in a bond indenture or a bank loan, to refrain from entering into any such transaction without the consent of its creditors." *Ibid.* But there is nothing "bizarre" about the Commission's reading of the statute. Indeed, that is precisely the reading this Court gave the

Act in *Schwabacher* v. *United States*, 334 U.S. 182 (1948). In that case, the ICC had approved a merger of two railroad companies, over the objection of certain preferred stockholders of one of the companies. Those stockholders claimed that the terms of the merger deprived them of the full measure of their rights to compensation under the corporate charter—rights that were theirs as owners of the preferred stock and that were recognized under state law. In reaching its determination, the Commission disclaimed jurisdiction to resolve the shareholders' complaint, ruling that after the merger was finally approved the dissenting claimants could file an action in state court to assert their rights as stockholders. This Court rejected the Commission's approach. Relying on the consolidation provisions of the ICA (41 Stat. 482)—including Section 5(11) (Transportation Act of 1940, ch. 722, § 7, 54 Stat. 905, 908-909), the immediate precursor of Section 11341(a) (see p. 35, *infra*)—the Court held that the Commission "was given complete control of the capital structure to result from a merger." 334 U.S. at 195. Accordingly, the Court explained, before approving the merger the Commission was required to consider the claims of the minority shareholders. *Id.* at 197-198. But once the Commission had done so, and had approved the final transaction as "just and reasonable" (*id.* at 194), the dissenting shareholders were not entitled to attack that decision collaterally, regardless of their rights under state law as owners of the shares. *Id.* at 201.[19]

[19] There is, of course, no question that the state law rights of the dissenting shareholders—rights superseded by Section 11341(a)—were contractual in nature, since they arose out of the corporate charter and the terms under which the preferred stock was offered for sale.

In *Texas & N.O. R.R.* v. *Brotherhood of R.R. Trainmen, supra*, the Fifth Circuit, relying on *Schwabacher*, recognized the Commission's jurisdiction to "prevent the enforcement" of union contractual



### B. The Legislative History Of Section 11341(a) Confirms That ICC-approved Mergers Are Exempt From All Legal Obstacles, Including Collective Bargaining Agreements, That May Jeopardize The Implementation Of The Merger

The legislative history of Section 11341(a), and of the consolidation provisions generally, confirms the meaning of the text: once approved by the ICC after a plenary public interest proceeding, a merger is immunized from all legal obstacles—including those posed by obligations under collective bargaining agreements—that threaten the implementation of the approved transaction. Indeed, Congress on two occasions—in 1933, and again in 1940—expressly *refused* to narrow the scope of the ICC's consolidation authority by carving out a special exception for obligations arising from labor agreements.

#### 1. *The Transportation Act of 1920*

The language of the present Section 11341(a) finds its origin in the Transportation Act of 1920, ch. 91, 41 Stat. 456. See generally *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298, 315-321 (1954) (appendix to opinion of the Court). Sections 407 and 408 of the 1920 Act, 41 Stat. 480, 482, amended Section 5 of the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 380, specifically to encourage railroad consolidation. See *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. at 315-316. Following a period of governmental ownership during World War I, "many of the railroads were in very weak condition and their continued survival was in jeopardy." *Id.* at 315. The 1920 Act therefore directed the Commission, "as soon as practicable," to "prepare and adopt a plan for the consolidation of the railway properties of the continental

demands found to jeopardize effectuation of an approved transaction. 307 F.2d at 161-162.

United States into a limited number of systems." § 407, 41 Stat. 481 (§ 5(4)). "As a result of the enactment of the Transportation Act of 1920, consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy * * * so intimately related to the maintenance of an adequate and efficient rail transportation system that the 'public interest' in the one cannot be dissociated from that in the other." *United States* v. *Lowden*, 308 U.S. 225, 232 (1939).

To facilitate the consolidation process, the 1920 Act added Section 5(8), exempting participants in Commission-approved consolidations from federal and state legal obstacles. 41 Stat. 482. Section 5(8) stated (41 Stat. 482 (emphasis added)):

> The carriers affected by any order made under the foregoing provisions of this section * * * shall be, and they are hereby, relieved from the operation of the "antitrust laws," * * * *and of all other restraints or prohibitions by law*, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

Consistent with the overall purpose to effectuate consolidation, this broad statutory language targeted all legal "restraints or prohibitions" that might otherwise impede the covered carrier from accomplishing "anything authorized" by the Commission pursuant to the consolidation provisions.

### 2. *The Emergency Railroad Transportation Act of 1933*

In the years following the enactment of the 1920 Act, there was a continuing decline in railway revenues and traffic. L. Lecht, *Experience Under Railway Labor Legislation* 105 (1955). Many railroads went bankrupt,



while others borrowed large sums of money from the Reconstruction Finance Corporation to fund continuing operations. S. Rep. No. 87, 73d Cong., 1st Sess. 1 (1933). To meet the resulting interest charges, many railroads deferred maintenance. H.R. Rep. No. 193, 73d Cong., 1st Sess. 9 (1933). Railroad employment dropped from 1,750,000 to 1,000,000. *Ibid.* Responding to the crisis, Congress enacted the Emergency Railroad Transportation Act of 1933 (ERTA), ch. 91, 48 Stat. 211.

Title I of ERTA was temporary legislation—ultimately of three years duration [20]—that was intended to help the railroads become financially stable. See S. Rep. No. 87, *supra*, at 1. It established "emergency powers to be exercised through a railroad coordinator," whose task was "to compel the elimination of unnecessary expenses and the duplication of services and other economy measures" in order "to stabilize the value of railroad securities and make unnecessary a continued drain on Reconstruction Finance Corporation funds." *Id.* at 1-2. The coordinator did not, however, have explicit authority to compel consolidations. See 77 Cong. Rec. 4859 (1933) (Rep. Rayburn) ("The coordinator has nothing whatever to do with consolidations. * * * [T]he question of consolidation * * * is left where it has been since 1920, with the Interstate Commerce Commission and not with any coordinator"). See also *St. Joe Paper Co* v. *Atlantic Coast Line R.R.*, 347 U.S. 298, 317 (1954).

Section 10(a) of Title I of ERTA (48 Stat. 215) contained an immunity provision with language that generally paralleled Section 5(8) of the Transportation Act of 1920

---

[20] Originally enacted for one year, Title I was extended for an additional year by Presidential proclamation, Proclamation No. 2081, 48 Stat. 1740 (1934), and then for a third year, until June 17, 1936, by Congress. S.J. Res. 112, 74th Cong., 1st Sess.; 79 Cong. Rec. 9346 (1935).

(41 Stat. 482), the earliest precursor of Section 11341(a). Significantly, however, in response to concerns raised by labor representatives, Congress added an explicit exception from Section 10(a) for the requirements of the RLA and for duties and obligations under collective bargaining agreements entered into pursuant to that Act. Section 10(a) therefore provided in pertinent part (48 Stat. 215):

> The carriers or subsidiaries subject to the Interstate Commerce Act, as amended, affected by any order of the Coordinator or Commission made pursuant to this title shall, so long as such order is in effect, be, and they are hereby, relieved from the operation of the antitrust laws, * * * and of all other restraints or prohibitions by law, State or Federal, other than such as are for the protection of the public health or safety, in so far as may be necesssary to enable them to do anything authorized or required by such order made pursuant to this title: *Provided, however*, That nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act.[21]

At the same time, in Title II of ERTA—which, unlike Title I, was *permanent* legislation, see S. Rep. No. 87,

[21] Title I also contained an additional labor protection, ensuring that, allowing for normal attrition, no action taken by the Coordinator could reduce the number of railroad employees below the number in service during May 1933, and providing further that no employee then in service shall "be deprived of employment such as he had during said month of May or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title." § 7(b), 48 Stat. 214.



*supra*, at 1—Congress amended the consolidation provisions of the Interstate Commerce Act, principally to "give the Commission control over holding companies that acquire stocks of railroads, and thereby effect consolidations without approval of the commission." *Ibid.* In Section 202(15) of Title II, Congress reenacted the immunity provision—Section 5(8) of the 1920 Act—adding somewhat broader language in the process. See 48 Stat. 219. Congress did *not*, however, carve out an exception for the Railway Labor Act or for obligations under agreements made pursuant to that statute. Section 202(15) provided in pertinent part (48 Stat. 219):

> The carriers and any corporations affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the antitrust laws * * * and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order.

The striking difference between Title I of ERTA (temporary legislation, containing an explicit exception for collective bargaining agreements) and Title II of the statute (a precursor of Section 11341(a), containing no exception for collective bargaining agreements) cannot be considered accidental. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983).[22] Indeed, this Court made that very point in con-

[22] Accord *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). See also *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148-149 (1980); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19-20 (1979).

nection with a related provision of ERTA. In *Texas* v. *United States*, 292 U.S. 522 (1934), the ICC had approved a control transaction, over a State's objection that the terms of the transaction would improperly permit the parties to relinquish certain offices within the State. In this Court, the State contended that the transaction violated Section 11 of Title I of ERTA, which withheld from carriers the authority to abandon offices and shops. 48 Stat. 215. The Court rejected that contention. Section 11, the Court explained, was contained in Title I, which dealt only with the " 'emergency powers' * * * of the Federal Coordinator of Transportation and kindred matters." 292 U.S. at 533. As such, the Court added, Section 11 did "not by its terms apply to the provisions of Title II of the Act, in which are found the amendments of § 5 of the Interstate Commerce Act with respect to the approval and authorization by the Interstate Commerce Commission of consolidations, purchases and leases." 292 U.S. at 533. "The insertion of the provision in Title I, * * * and the omission of a similar provision from Title II, indicate an intentional distinction." *Id.* at 534.

So, too, with respect to the exception for collective bargaining agreements: in structuring Titles I and II as it did, Congress "demonstrated that it knew how to provide [for an exception for collective bargaining agreements] when it wished to do so elsewhere in the very 'legislation cited.' " *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981). "Under traditional principles of statutory construction," the difference between the two sections must therefore be seen as intentional. *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981). See *Lawrence County* v. *Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256, 267 (1985); *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).



### 3. *The Transportation Act of 1940*

Section 7 of the Transportation Act of 1940, ch. 722, 54 Stat. 905, amended and recodified Section 5 of the ICA but left the provisions relevant here substantially intact. In particular, Section 5(8) of the 1920 Act, as amended, was subsumed within revised Section 5(11) (54 Stat. 908-909), and remained essentially unchanged. Section 5(11) provided in pertinent part (54 Stat. 908-909):

> any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission * * *.

When Congress recodified this language in the present Section 11341(a) of the ICA, it effected no substantive change. Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1466; *Trailer Marine Transp. Corp* v. *FMC*, 602 F.2d 379, 383 n.18 (D.C. Cir. 1979). See H.R. Rep. No. 1395, 95th Cong., 2d Sess. 158-160 (1978). See also *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 299 n.12 (1987) (Stevens, J., concurring in the judgment).

During the legislative process culminating in the 1940 Act, there was "a widespread awareness in the railroad industry that many of the economies to be gained from consolidations or abandonments could be realized only at the expense of displaced railroad labor." *Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. 142, 147 (1950). Reflecting that concern, Congress enacted, in Section

5(2)(f) of the Act, 54 Stat. 906-907, a labor protective provision for employees affected by ICC-approved consolidations.[23]

Prior to the enactment of Section 5(2)(f), however, Representative Harrington offered an amendment to the provision, designed to protect affected employees against any displacement or other interference with contractual rights:

> *Provided, however*, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees

[23] Section 5(2)(f) provided as follows (54 Stat. 906-907):

> As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provision of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Transportation Act of 1940, ch. 722, § 7, 54 Stat. 906-907 (§ 5(2)(f)). The current version of this provision is 49 U.S.C. 11347 (Supp. V 1987). See p. 40, *infra*.



> of the carrier or carriers, or in the impairment of existing employment rights of said employees.

84 Cong. Rec. 9882 (1939). The proposed amendment posed a significant obstacle to the prospects of future consolidations. As this Court observed in *Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. at 151, until the Harrington Amendment was offered, "there had been substantial agreement on the need for consolidations, together with a recognition that employees could and should be fairly and equitably protected. This amendment, however, threatened to prevent all consolidations to which it related."

Not surprisingly, therefore, the Harrington Amendment encountered intense opposition. In a January 29, 1940 letter to the Chairman of the Senate and House Committees on Interstate Commerce, the Interstate Commerce Commission stated:

> As for the [Harrington Amendment], the object of unifications is to save expense, usually by the saving of labor. * * * The proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees. In these days of intense competition from other forms of transportation, the railroads must, if they are to thrive and grow, conduct their operations with the utmost possible economy and efficiency. If they are prevented from doing this, further shrinkage of operations and continuing loss of employment are inevitable.

Staff of House Legislative Comm. On Interstate Commerce Commission, 76th Cong., 3d Sess., *Omnibus Transportation Legislation* 67 (House Comm. Print 1940). After a lengthy conference, on April 26, 1940, the conferees agreed on a bill that followed the form of the House

Amendment but did not contain the Harrington Amendment. See H.R. Conf. Rep. No. 2016, 76th Cong., 3d Sess. 16 (1940); 86 Cong. Rec. 5879-5880 (1940). The House voted to recommit the bill with instructions to its conferees to insist on a modified version of the Harrington Amendment. 86 Cong. Rec. 5886 (1940). After further consideration, the conferees then reported out the bill a second time without the Harrington Amendment. That bill became the Transportation Act of 1940.[24]

The defeat of the Harrington Amendment confirms Congress's intent to allow carriers to implement ICC-approved consolidations—notwithstanding the "impairment of existing employment rights of * * * employees"—as long as those employees are compensated and otherwise fairly protected under the Commission's labor protective conditions. Accord *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169 (1961). The court of appeals' decision in the present case overlooks the point, construing Section 11341(a) as if the Harrington Amendment had become law and indeed had been rewritten to extend to all contractual obligations. But the amendment was rejected; and "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987). See generally *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 96 (1935).

---

[24] The bill was passed by the House on August 12, 1940, 86 Cong. Rec. 10,194, and by the Senate on September 9, 1940, 86 Cong. Rec. 11,766. It was signed by the President on September 18, 1940, 86 Cong. Rec. 12,290.



### C. The Court of Appeals' Decision Cannot Be Squared With The Purpose Of The ICA Consolidation Provisions

The scope of Section 11341(a) must also be "measured by the purpose which Congress had in view"—in this case, "the promotion of economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure" (*Texas* v. *United States*, 292 U.S. 522, 534-535 (1934)). The court of appeals' conclusion—according to which collective bargaining agreements are fully enforceable even when they are in conflict with the terms of an ICC-approved consolidation—cannot be squared with that evident purpose.

The consolidation provisions foster the merger process, while at the same time accommodating, to the fullest extent possible, the competing claims of employees and other persons who may be adversely affected by the proposed transaction. The statute accomplishes that goal by providing interested parties—including labor unions—extensive opportunities to participate in the Commission's consolidation review proceedings and to voice their objections during the "public interest" inquiry. Parties may object, in whole or in part, to approval of a transaction, on the ground that such approval will undermine the policies expressed in other federal statutes. The Commission must take account of these objections, in determining whether the merger is "consistent with the public interest." 49 U.S.C. 11344(c). See, *e.g.*, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79-80 (1944) (antitrust objections to motor carrier consolidation).

The consolidation provisions are particularly solicitous of employees who may be adversely affected by a transaction. Recognizing that consolidations necessarily "result in wholesale dismissals and extensive transfers, involving expense to transferred employees," as well as "the loss of seniority rights" (*United States* v. *Lowden*, 308 U.S. 225,

233 (1939)), the statute imposes a variety of labor protective requirements. Before it may give its approval, the Commission must consider "the interest of carrier employees affected by the proposed transaction." 49 U.S.C. 11344(b)(1)(D). Moreover, as part of any approved transaction, the Commission must impose certain "employee protective arrangements," including a guarantee generally ensuring that "the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission." 49 U.S.C. 11347 (Supp V 1987). And pursuant to Section 11347, the Commission has traditionally imposed the so-called *New York Dock* conditions, which generally entitle an affected employee to receive, for a period of years, the equivalent of the wages he received prior to displacement. See *New York Dock Ry.—Control—Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, 84-90, aff'd *sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).

In this manner, the consolidation provisions ensure that all affected parties have a voice in the approval process, and are accommodated as fully as possible in the approved transaction. At the same time, Section 11341(a) ensures that once the approval has been granted, an exemption from "all other law" takes immediate effect. The statute does not permit employees, who have already received the protections afforded by Section 11347, to impede implementation of the merger by insisting on conflicting collective bargaining rights under the RLA.

Were resort to the RLA necessary, approved transactions would "be subjected to the risk of non-consummation" (Pet. App. 34a). By proposing a change in the existing collective bargaining agreement, the transaction would thereby provoke a "major" dispute under the



RLA. See *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2477, 2480 (1989); *Elgin, J. & E. Ry* v. *Burley*, 325 U.S. 711, 723 (1945), aff'd on reh'g, 327 U.S. 661 (1946). In any such dispute, the parties must maintain the status quo while engaging in a lengthy process of negotiation, mediation, and possibly review by a Presidential Emergency Board. *Detroit & Toledo Shore Line R.R.* v. *United Transp. Union*, 396 U.S. 142 (1969). If that process fails to produce an agreement, each side is free to resort to strikes, lock-outs, or other forms of economic self-help calculated to achieve the desired objectives. See 45 U.S.C. 152 Second and Seventh, 155 First, 156, 157, 160; *Burlington Northern R.R.* v. *Brotherhood of Maintenance of Way Employes*, 481 U.S. 429, 444-445 n.10 (1987); *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

Although that "virtually endless" process may well be suited to prevent the kind of "labor unrest" that gave rise to the RLA (*Burlington Northern R.R.* v. *Brotherhood of Maintenance of Way Employes*, 481 U.S. at 444), it poses severe difficulties for approved consolidations. "[U]nder the Railway Labor Act provisions, it is possible for either party to completely block any change in working conditions by refusing to agree to a change and by refusing to arbitrate." *Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 314 F.2d at 431. As the Commission has noted, "[s]ince there is no mechanism * * * for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected." Pet. App. 34a. If applicable, the RLA would therefore "threaten to prevent many consolidations." *Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 314 F.2d at 431. Such an outcome cannot be squared with the evident purpose of the consolidation provisions, and Section 11341(a) in particular: to provide an exemp-

tion "as necessary to let [the participant] carry out the transaction" (49 U.S.C. 11341(a)).

### D. The Court Of Appeals Erroneously Declined To Defer To The Commission's Construction Of Section 11341(a)

This Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985). In light of the text, history, and purpose of Section 11341(a), the Commission's conclusion—that the Section applies to legal obligations under collective bargaining agreements—is entitled to deference and should be upheld.

The court of appeals acknowledged those principles (Pet. App. 11a), but declined to defer to the Commission's construction of the statute. The court observed that deference is appropriate only when a court determines, "based upon the language of the statute and the 'traditional tools of statutory construction,' * * * that Congress has not 'directly spoken to the precise question at issue' " (*ibid.*). The court therefore elected to "strike out * * * in search of Congress's intent in enacting the immunity provision of the Act." *Id.* at 11a-12a.

The results of the court's "search" did not justify the panel's refusal to defer to the Commission. After canvassing the text and history of the statute, all the court could determine—on its view of the case—was (1) that Section 11341(a) does not *expressly* refer to "contracts" (Pet. App. 12a); (2) that Section 11341(a) was intended *principally* to



protect against "unfriendly state commissions and legislatures" (Pet. App. 15a) and "recently invigorated antitrust laws of the federal Government" (*id.* at 16a); (3) that in enacting Section 11341(a) Congress had "focused nearly exclusively" on "positive enactments, not common law rules of liability" (Pet. App. 18a); and (4) that in the legislative debates on the 1920 Act, Congress had "exhibited a healthy respect for privately negotiated contracts" (*ibid.*).

Even under the court of appeals' view (which we vigorously dispute), that evidence does not justify a refusal to defer to the Commission. Assuming that Congress did not directly address the precise question at issue, the question before the court was whether the Commission's construction of the statute "in the context of this particular program is a reasonable one." *Chevron U.S.A. Inc.*, 467 U.S. at 843-845. Here, the Commission's judgment is plainly reasonable. Thus, even were the case a close one on the merits—and we do not think it is—the court of appeals erred in "substitut[ing] its own construction of a statutory provision for a reasonable interpretation * * * of an agency" (*Chevron U.S.A. Inc.* 467 U.S. at 844).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**
DAVID L. SHAPIRO
*Deputy Solicitor General*
LAWRENCE S. ROBBINS
*Assistant to the Solicitor General*

ROBERT S. BURK
*General Counsel*
HENRI F. RUSH
*Deputy General Counsel*
JOHN J. MCCARTHY, JR.
*Deputy Associate General Counsel*
*Interstate Commerce Commission*

MAY 1990

---

* The Solicitor General is disqualified in this case.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/00902

# In the Supreme Court of the United States

OCTOBER TERM, 1995

---

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.,
PETITIONERS

*v.*

AMERICAN TRAIN DISPATCHERS ASSOCIATION, ET AL.

---

CSX TRANSPORTATION, INC., PETITIONER

*v.*

BROTHERHOOD OF RAILWAY CARMEN, ET AL.

---

*ON WRITS OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

**RESPONSE FOR THE FEDERAL RESPONDENTS**
**TO THE MOTION BY THE UNION RESPONDENTS**
**TO DISMISS THE PETITIONS**

---


JOHN G. ROBERTS, JR.
*Acting Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

ROBERT S. BURK
*General Counsel*
HENRI F. RUSH
*Deputy General Counsel*
JOHN J. McCARTHY, JR.
*Deputy Associate General Counsel*
*Interstate Commerce Commission*
*Washington, D.C. 20423*


BEST AVAILABLE COPY

# In the Supreme Court of the United States

OCTOBER TERM, 1989

---

No. 89-1027

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL., PETITIONERS

*v.*

AMERICAN TRAIN DISPATCHERS ASSOCIATION, ET AL.

---

No. 89-1028

CSX TRANSPORTATION, INC., PETITIONER

*v.*

BROTHERHOOD OF RAILWAY CARMEN, ET AL.

---

*ON WRITS OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## RESPONSE FOR THE FEDERAL RESPONDENTS TO THE MOTION BY THE UNION RESPONDENTS TO DISMISS THE PETITIONS

---

In their motion filed May 25, 1990, respondents American Train Dispatchers' Association and Brotherhood of Railway Carmen (the union respondents) ask this Court to dismiss the petitions in this case on the ground of mootness or, alternatively, on the ground that the petitions no longer present

an important question of federal law warranting resolution by this Court.

The union respondents base their motion on a press release issued by the Interstate Commerce Commission on May 17, 1990. In it, the Commission noted that at a May 15 voting conference it had resolved certain issues left open by the court of appeals' decision remanding the present case to the agency. In particular, the press release advised, the Commission had "review[ed] the relationship between the Interstate Commerce Act and the Railway Labor Act in connection with the treatment of employees in mergers and consolidations over the past 50 years." On the basis of that review, the release added, the Commission had determined that "collective bargaining agreements [may] be modified under 49 U.S.C. 11347 and the ICC's employee-protective conditions, but only with respect to the selection of work forces and the assignment of employees—with some qualifications—and only to the extent necessary to permit the carrying out of a merger or consolidation. Employees' contract rights are otherwise to be preserved and their traditional right to bargain over their pay, rules, and working conditions is not to be undermined." The release concluded that "[i]n light of the new approach stated in its decision, the Commission reversed and vacated the two arbitration awards under review in these cases and remanded them for further negotiation by the involved parties and for consideration by arbitrators if necessary in accordance with the decision."

The union respondents contend that, in light of the Commission decision reported in the press release, the present controversy—concerning the question whether 49 U.S.C. 11341(a) applies to legal obligations arising from collective bargaining agreements—is either moot or of no continuing importance. Whatever the merits of that claim—and, at this time, we take no position on that question—it can hardly



be resolved on the basis of a press release. We anticipate, however, that a Commission decision will be issued in the near future. Accordingly, we respectfully suggest that the Court either (1) deny the motion to dismiss, with leave for the union respondents to refile (if they desire) when the decision ultimately issues, or (2) hold the motion until the Commission's decision issues, at which time the parties can address the appropriateness of the relief sought by the union respondents.

For the foregoing reasons, it is respectfully submitted that the motion to dismiss the petitions should be denied or, alternatively, held until the issuance of the Commission's decision.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**

ROBERT S. BURK
*General Counsel*

HENRI F. RUSH
*Deputy General Counsel*

JOHN J. McCARTHY, JR.
*Deputy Associate General Counsel*
*Interstate Commerce Commission*

MAY 1990

---

* The Solicitor General is disqualified in this case.

U.S. GOVERNMENT PRINTING OFFICE: 1990—262-203/00916

Supreme Court, U.S.
FILED
JUN 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1028

# In The Supreme Court of the United States October Term, 1989

CSX TRANSPORTATION, INC.,

*Petitioner,*

*v.*

BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,

*Respondents.*

On Writ of Certiorari To The
United States Court Of Appeals
For the District Of Columbia Circuit

## PETITIONER'S RESPONSE TO MOTION TO DISMISS

JAMES S. WHITEHEAD
*(Counsel of Record)*
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703

NICHOLAS S. YOVANOVIC
JAMES D. TOMOLA
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

*Attorneys for Petitioner*
*CSX TRANSPORTATION, INC.*

June 1, 1990

American Reprographics Management, Inc.™ (312) 332-2764

## TABLE OF CONTENTS

*Page*

Table of Authorities ..... ii

Introduction ..... 1

Argument ..... 2

I. The Issue Presented by CSXT's Petition Has Not Been Rendered Moot by Any Actions of the Interstate Commerce Commission ..... 2

II. The Issue of the Proper Interpretation of ICA § 11341(a) Is a Matter of Substantial Federal Importance ..... 5

Conclusion ..... 7

## TABLE OF AUTHORITIES


**Cases** *Page*

*Bakery Sales Drivers Local Union No. 33* v. *Wagshal*, 333 U.S. 437 (1948) ..... 5

*Brandywine Valley R.R. — Purchase — CSX Transportation, Inc.*, 5 I.C.C.2d 764 (1989), *appeal docketed*, No. 89-1503 (D.C. Cir.) ..... 6

*Brotherhood of Locomotive Engineers* v. *ICC*, 885 F.2d 446 (8th Cir. 1989) ..... 6

*Brotherhood of Ry. Carmen* v. *ICC*, 880 F.2d 562 (D.C. Cir. 1989) ..... 2, 3

*CSX Corp. — Control — Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, I.C.C. Finance Docket No. 28905 (Sub-No. 22) ..... 2, 3

*ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) ..... 6

*Maher* v. *Roe*, 432 U.S. 464 (1977) ..... 4

*Norfolk & Western Ry.* v. *American Train Dispatchers' Ass'n*, No. 89-1027 (U.S.) ..... 1

*Norfolk Southern Corp. — Control — Norfolk & W. Ry. and Southern Ry.*, I.C.C. Finance Docket No. 29430 (Sub-No. 20) ..... 2

*Railway Labor Exec's' Ass'n* v. *ICC*, 883 F.2d 1079 (D.C. Cir. 1989) ..... 6

*Schwabacher* v. *United States*, 334 U.S. 182 (1948) ..... 6

*Schweiker* v. *Gray Panthers*, 453 U.S. 34 (1981) ..... 4

*United States* v. *Lowden*, 308 U.S. 225 (1939) ..... 6





*Page*

**Statutes**

Interstate Commerce Act

§ 11341(a), 49 U.S.C. § 11341(a) ..... *passim*

§ 11347, 49 U.S.C. § 11347 ..... 3, 4

No. 89-1028

# In The Supreme Court of the United States October Term, 1989

CSX TRANSPORTATION, INC.,

*Petitioner,*

*v.*

BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,

*Respondents.*

On Writ of Certiorari To The
United States Court Of Appeals
For the District Of Columbia Circuit

## PETITIONER'S RESPONSE TO MOTION TO DISMISS

### Introduction

Respondent Brotherhood of Railway Carmen ("BRC") filed a Motion to Dismiss on May 24, 1990 (one day before Petitioner's brief on the merits was due to be filed), asking the Court to dismiss the writ of certiorari granted herein on March 26, 1990,[1] on two

[1] The Motion to Dismiss was also filed by Respondent American Train Dispatchers' Association in *Norfolk & Western Ry.* v. *American Train Dispatchers' Ass'n*, No. 89-1027 (U.S.), in which a writ of certiorari was also granted on March 26, 1990, and which the Court has consolidated with the instant case for oral argument.

grounds: first, BRC claims that the issue presented herein — whether § 11341(a) of the Interstate Commerce Act ("ICA") immunizes consolidating rail carriers from compliance with obligations arising from Railway Labor Act collective bargaining agreements — "has been rendered moot by recent actions of the Interstate Commerce Commission"; second, BRC argues that this case no longer presents an important question of federal law that should be settled by the Court. BRC Motion to Dismiss at 2. Both arguments are without merit.

BRC's motion is remarkable in several respects. First, the "recent actions" of the ICC on which BRC relies are merely the comments of the Commissioners at open voting conferences and a press release, issued on May 17, 1990, that purports to summarize the forthcoming ICC decision in the consolidated remand proceedings[2] that have resulted from the Commission's compliance with the decision issued by the United States Court of Appeals for the D.C. Circuit in this case.[3] The Commission's decision has yet to be issued. Its actual contents have not been made public.

Second, BRC's arguments are identical to those already raised by it in its Brief in Opposition to CSXT's Petition for a Writ of Certiorari. This Court rejected those arguments when, on March 26, 1990, it granted the petition. These arguments are no more meritorious now.

## Argument

### I. The Issue Presented by CSXT's Petition Has Not Been Rendered Moot by Any Actions of the Interstate Commerce Commission.

BRC's suggestion that the forthcoming ICC decision will render the issue presented in CSXT's petition moot is wholly without merit. Resolution of this issue — whether § 11341(a) of

---

[2] I.C.C. Finance Docket No. 28905 (Sub-No. 22), *CSX Corp. — Control — Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, and I.C.C. Finance Docket No. 29430 (Sub-No. 20), *Norfolk Southern Corp. — Control — Norfolk & W. Ry. and Southern Ry.*

[3] *Brotherhood of Ry. Carmen* v. *ICC*, 880 F.2d 562 (D.C. Cir. 1989); Pet. App. 1a.



the ICA exempts consolidating rail carriers from legal obligations flowing from Railway Labor Act ("RLA") collective bargaining agreements — remains vital to the proper resolution of this dispute. BRC has argued throughout these proceedings that nothing in the ICA frees CSXT from its contractual obligations or its obligation to comply with the bargaining procedures of the RLA should it seek to change those agreements. BRC has not abandoned these arguments; thus, an active controversy between the parties still exists.

Both the arbitrator appointed under the Commission's labor protection conditions and the Commission itself, on review, concluded that § 11341(a) empowered the arbitrator to adopt an implementing agreement that would allow CSXT to move the car repair work and the employees who had performed it from Waycross to Raceland, notwithstanding any contractual impediments. Pet. App. 80a-82a, 43a-44a. The D.C. Circuit, however, concluded that § 11341(a) did not immunize a carrier from compliance with contractual obligations. *Brotherhood of Ry. Carmen*, 880 F.2d at 567-68; Pet. App. 19a.

The court of appeals remanded the record back to the Commission only for limited purposes. *Id.*, 880 F.2d at 573-74; Pet. App. 25a. In compliance with the court of appeals' limited mandate, the Commission requested comments from the parties and the public on only two issues: (1) whether § 11341(a) operates to override the Railway Labor Act, and (2) the impact of Commission approval of a transaction subject to labor protection obligations under § 11347 and the Commission's standard labor conditions upon the rights and remedies of parties under the RLA and existing collective bargaining agreements.[4] As the Commissioners recognized at their February 9, 1990, public voting conference, they are bound to follow the court of appeals' interpretation of § 11341(a) as it relates to contractual obligations in the proceedings on remand.[5]

---

[4] *CSX Corp. — Control — Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, ICC Finance Docket No. 28905 (Sub-No. 22) (served Sept. 20, 1989), at 1.

[5] Transcript of February 9, 1990, Voting Conference in *CSX Corp. — Control — Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, ICC Finance Docket No. 28905 (Sub-No. 22), at 48-49.

Accordingly, it must be assumed that the Commission's forthcoming decision will be in full compliance with the court of appeals' mandate and will comport with the court of appeals' flawed interpretation of the authority conferred on consolidating carriers by ICA § 11341(a). CSXT has demonstrated in its Brief, filed on May 25, 1990, that that interpretation is fundamentally erroneous. *See also* the Brief of Petitioners Norfolk and Western Railway and Southern Railway in Case No. 89-1027. More importantly, the ICC has similarly argued to this Court that the court of appeals has erred in this regard. *See* Brief for the Federal Respondents Supporting Petitioners in Nos. 89-1027 and 89-1028.

Thus, to the extent the Commission may articulate a "new approach" in its forthcoming decision (perhaps one based on § 11347), as the press release suggests, that "new approach" will have resulted solely from the need to comply with the court of appeals' flawed decision and not, as BRC erroneously suggests in its motion, from any determination by the Commission that, "regardless of what may be this Court's ruling on the issue pending before it, it is section 11347, not section 11341(a), that governs and restricts its actions in merger and control cases with regard to employees' contract and Railway Labor Act rights." BRC Motion at 5. To the contrary, the Brief for the Federal Respondents, filed after the press release on which BRC bases its claim of mootness, eloquently articulates the Commission's continued position that § 11341(a) exempts CSXT from legal obligations imposed by its collective bargaining agreements in this case.

This Court has repeatedly ruled that mere compliance by an administrative agency with a court's mandate does not moot the issue of the correctness of the court's decision so as to preclude subsequent Supreme Court review. *See, e.g., Schweiker* v. *Gray Panthers,* 453 U.S. 34, 42 n.12 (1981) (action of Secretary of Department of Health and Human Services in issuing provisional regulations does not moot controversy because, "[i]n issuing the provisional regulations, the Secretary simply was adhering to the lower court's reasoning and mandate"); *Maher* v. *Roe,* 432 U.S. 464, 468-69 n.4 (1977) (issuance of revised regulations "for the purpose of interim compliance with the District Court's



judgment and order" does not render case moot); *cf. Bakery Sales Drivers Local Union No. 33* v. *Wagshal,* 333 U.S. 437, 442 (1948) (union's conduct in lifting challenged boycott in "obedience to the judgment now here for review" does not render case moot). A similar determination is compelled here.

Prior to the court of appeals' decision herein, CSXT had obtained from the ICC and its arbitrator an arbitrated implementing agreement that provided for the transfer of car repair work and BRC-represented employees from Waycross to Raceland. That result may now be in jeopardy, if the Commission's press release is to be believed, because of the court of appeals' erroneous interpretation of § 11341(a). Because of the court of appeals' flawed analysis, CSXT may now again be required to engage in fruitless negotiations with BRC and to participate in further proceedings before the arbitrator seeking another implementing agreement. The collective bargaining agreements and RLA provisions asserted by BRC will remain obstacles to this shop consolidation unless overridden. For BRC to claim that "the issue of the meaning and effect of section 11341(a) is no longer material to the pending disputes" (BRC Motion at 5) and that this matter is now moot is wildly disingenuous.

## II. The Issue of the Proper Interpetation of ICA § 11341(a) Is a Matter of Substantial Federal Importance.

BRC also argues in its Motion to Dismiss that the "actions" of the ICC have "drained the cases as currently presented to this Court of any general importance for future railroad merger and control cases approved pursuant to the Interstate Commerce Act." BRC Motion to Dismiss at 6. This argument too is simply wrong. Indeed, to the extent the ICC press release demonstrates that the court of appeals' erroneous interpretation of a key provision of the ICA has forced the Commission to depart from its well-established precedent, these "actions" provide further support for this Court's grant of certiorari on March 26, 1990.

As CSXT has shown in both its Petition for Writ of Certiorari and its Brief, the court of appeals' decision is inconsistent with

controlling precedent from this Court[6] and with a long line of decisions from other courts of appeals, ignores both the plain meaning and the persuasive legislative history of § 11341(a), and threatens to impede the accomplishment of Congress' national transportation policy. The Federal Respondents agree. The decision has already infected other court of appeals'[7] and ICC decisions.[8] The ICC press release suggests it may continue to influence the outcomes of all future Commission decisions in this area.

Accordingly, the reasons for review by this Court of the court of appeals' decision remain compelling and in fact are reinforced by the so-called ICC "actions".

---

[6] *See, e.g., Schwabacher* v. *United States*, 334 U.S. 182 (1948); *United States* v. *Lowden*, 308 U.S. 225 (1939); *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 298 (1987) (Stevens, J., concurring).

[7] *Brotherhood of Locomotive Engineers* v. *ICC*, 885 F.2d 446 (8th Cir. 1989); *Railway Labor Exec's' Ass'n* v. *ICC*, 883 F.2d 1079 (D.C. Cir. 1989).

[8] *Brandywine Valley R.R. — Purchase — CSX Transportation, Inc.*, 5 I.C.C.2d 764 (1989), *appeal docketed*, No. 89-1503 (D.C. Cir.).



## Conclusion

The Motion to Dismiss filed by Respondent Brotherhood of Railway Carmen should be denied.

Respectfully submitted,

JAMES S. WHITEHEAD
*(Counsel of Record)*
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703

NICHOLAS S. YOVANOVIC
JAMES D. TOMOLA
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

*Attorneys for Petitioner*
*CSX TRANSPORTATION, INC.*

June 1, 1990

(13) (14)

Nos. 89-1027 and 89-1028

FILED
SEP 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

---

NORFOLK & WESTERN RAILWAY COMPANY and
SOUTHERN RAILWAY COMPANY,
*Petitioners,*

v.

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, *et al.*,
*Respondents.*

---

CSX TRANSPORTATION, INC.,
*Petitioner,*

v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
*Respondents.*

---

**On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

---

WILLIAM G. MAHONEY
(Counsel of Record)
JOHN O'B. CLARKE, JR.

HIGHSAW, MAHONEY
& CLARKE, P.C.
Suite 210
1050 - 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

*Attorneys for Union Respondents American Train Dispatchers' Association and Brotherhood of Railway Carmen*

Date: September 19, 1990

BEST AVAILABLE COPY

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

---

Nos. 89-1027 and 89-1028

---

NORFOLK & WESTERN RAILWAY COMPANY and
SOUTHERN RAILWAY COMPANY,
*Petitioners,*

v.

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, *et al.*,
*Respondents.*

---

CSX TRANSPORTATION, INC.,
*Petitioner,*

v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
*Respondents.*

---

**On Writs of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

---

## SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

---

The American Train Dispatchers' Association and the Brotherhood of Railway Carmen [hereinafter, "union respondents"] on May 24, 1990 filed a motion to dismiss the Writs of Certiorari entered in these proceedings on the grounds that the issue as presented in those Writs had been rendered moot by recent actions of the Interstate Commerce Commission [hereinafter, "Commission" or "ICC"] or, alternatively, that they should be dismissed

as no longer presenting an important question of federal law which should be decided by this Court.

The Federal respondents replied to the motion but took no position on the issues of mootness or continuing importance; however, they suggested to the Court that it might "hold the motion until the Commission's decision issues,[1] at which time the parties could address the appropriateness of the relief sought by the union respondents".

On May 25, 1990, the railroad and Federal respondents filed their briefs on the merits. Union respondents' brief was due to be filed on July 20, 1990 but on June 11, 1990, the Court issued the following order:

> Further consideration of the motion of respondents American Train Dispatchers' Association, *et al.* to dismiss is deferred for 120 days. Further briefing in this case is suspended for 120 days.

On June 21, 1990, the Commission issued its written opinion[2] which union respondents consider to be in excess of the limitations placed upon the ICC by the remand order of the Court of Appeals. The union respondents requested the Court of Appeals to require the Commission to conform its decision and order to that court's remand order, which request was denied on September 10, 1990, effectively ending the proceeding in the court below.

A copy of the written decision of the Commission was filed with this Court by the Commission and is reported at 6 I.C.C.2d 715.

The Commission reversed and vacated the arbitration awards, a result the union respondents had sought since

[1] The union respondents' motion was based upon a news release prepared by the ICC describing the contents of its then yet to be released written opinion.

[2] The decision is accompanied by the 19-page dissent of Commissioner Lamboley.



they first instituted these actions, and remanded the proceedings "to the parties to continue the implementing process in accordance with Section 4 of the *New York Dock* conditions through further negotiations or arbitration, if necessary, to reach new implementing agreements in accordance with the standards set forth in this decision". (6 I.C.C. 2d at 757.)

## ARGUMENT

The Commission's written decision confirms in every respect the contents of the news release attached to union respondents' motion to dismiss. It holds, for example, that in its decision in the instant proceedings it does not rely "on § 11341(a) for authority to modify CBAs [*i.e.*, collective bargaining agreements], but on § 11347 and our conditions imposed thereunder, an area the *Carmen* court did not reach" (*id* at 750-51); that whatever may be the extent or effect of the authority granted the Commission under Section 11341(a) of the Interstate Commerce Act [49 U.S.C. § 11341(a)], ICC authority "is also defined and limited by the labor protective conditions adopted by the Commission pursuant to § 11347" (*id.* at 720); and, that "whatever the extent of exemptive authority conferred by that provision [§ 11341(a)] with respect to mergers and consolidations, it does not go beyond the limits of our authority under § 11347 and the labor protective conditions." (*Id.* at 751 n.29.)

The Commission goes on to note that indeed, it is employing a new approach, a "return to the pre-1980 approach based upon harmonizing the provisions of these [Interstate Commerce and Railway Labor] Acts" (*id.* at 718) by which it "wish[es] to reestablish the balance between the employee's legitimate right to bargain over the conditions of his employment and the railroads' equally legitimate right to promptly carry out transactions . . . ." (*Id.* at 721.) It acknowledges that for almost forty years a "relatively harmonious working relationship" existed "between management and labor when im-

plementing ICC-approved conditions"; but that since 1979, labor, management and the Commission "have been immersed in litigation involving the role of the RLA, the ICA, and the Commission's conditions".[3] (*Id.* at 745.) The Commission then concedes that a major factor contributing to the loss of industry harmony was "our decision in *DRGW* in 1983, followed by *Maine Central* in 1985" which arbitrators interpreted as holding that "§ 11341(a) insulates a transaction from all legal obstacles preventing or impeding effectuation" and that "the inconsistencies between Section 2 and 4 of the *New York Dock* conditions are to be resolved in favor of Section 4 . . . ." The Commission then confirms the fact that "[u]nder these interpretations, the preservation of contracts under Section 2 is given essentially no effect and any terms of a CBA can be overridden if it [sic] 'impede[s] effectuation' of the merger". (*Id.* at 746.) The Commission then determines that it does "not today endorse the broader implications of the arbitrator's ruling in the *Dispatchers* award nor . . . [does it] assert that any authority conferred by § 11341 may be exercised without regard § 11347 and the labor protective conditions." (*Id.* at 752.)

Union respondents respectfully submit that the Commission has shifted the focus of the dispute in these cases from the scope of the Commission's authority under Section 11341(a) to the scope of its authority under Section 11347, an issue not reached below and not presented by petitioners to this Court. Indeed, viewed against the backdrop of the Commission's decision, the meaning of Section 11341(a) becomes virtually irrelevant for, as the Commission has now concluded, regardless of the "extent or effect of . . . Section 11341(a) . . . , [ICC authority]

[3] The Commission errs regarding the year in which this litigation began. It began in 1983 following the Commission's decision in Finance Docket No. 30,000 (Sub-No. 18), *Denver and Rio Grande Western R. Co. - Trackage Rights - Missouri Pacific R. Co.* (not printed), served October 25, 1983 (*DRGW*).



is also defined and limited by . . . § 11347". (*Id.* at 720, *supra*, p. 3.)

## CONCLUSION

While the Commission's published decision may have raised a number of issues regarding the validity of the Commission's current view of its authority, union respondents respectfully submit it confirms that the issue now before this Court on writs of certiorari has been rendered moot or, at the least, has lost any stature as an important question of federal law that this Court should decide and, that the writs now should be dismissed.

Respectfully submitted,

WILLIAM G. MAHONEY
(Counsel of Record)
JOHN O'B. CLARKE, JR.
HIGHSAW, MAHONEY
& CLARKE, P.C.
Suite 210
1050 - 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500
*Attorneys for Union Respondents American Train Dispatchers' Association and Brotherhood of Railway Carmen*

Date: September 19, 1990

(15)

No. 89-1028

Supreme Court, U.S.
FILED
SEP 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

# In The Supreme Court of the United States October Term, 1989

**CSX TRANSPORTATION, INC.,**
*Petitioner,*

*v.*

**BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,**
*Respondents.*

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

## PETITIONER'S SUPPLEMENTAL RESPONSE TO MOTION TO DISMISS


JAMES S. WHITEHEAD
*(Counsel of Record)*
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703

NICHOLAS S. YOVANOVIC
JAMES D. TOMOLA
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

*Attorneys for Petitioner*
*CSX TRANSPORTATION, INC.*


September 27, 1990

BEST AVAILABLE COPY

## CONTENTS

*Page*

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

A. The Commission's Decision on Remand ..... 3

B. The Commission's Decision Denying the Railroads' Requests for a Stay ..... 4

C. The Unions' Petition to the D.C. Circuit ..... 5

ARGUMENT ..... 6

CONCLUSION ..... 8

## APPENDIX

*CSX Corp. — Control — Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, Finance Doc. No. 28905 (Sub-No. 22), served July 20, 1990 ..... 1a

Petition of Brotherhood of Railway Carmen, et al. in Support of Motion for Order to Interstate Commerce Commission to Conform Decision on Remand to Prior Court of Appeals Decision, filed August 6, 1990, in *Brotherhood of Railway Carmen* v. *ICC*, No. 88-1724 (D.C. Cir.), and *American Train Dispatchers' Ass'n* v. *ICC*, No. 88-1694 (D.C. Cir.) ..... 14a

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| *Bakery Sales Drivers Local Union No. 33* v. Wagshal, 333 U.S. 437 (1948) | 6 |
| *Brotherhood of Railway Carmen* v. *ICC*, 880 F.2d 562 (D.C. Cir. 1989), *cert. granted*, Nos. 89-1027 and 89-1028 (U.S.) | 5 |
| *CSX Corp. — Control — Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, 6 I.C.C.2d 715 (1990) | 2, 3, 4 |
| *CSX Corp. — Control — Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc*, Finance Doc. No. 28905 (Sub-No. 22), served July 20, 1990 | 2 |
| *Maher* v. *Roe*, 432 U.S. 464 (1977) | 6 |
| *Norfolk & Western Ry.* v. *American Train Dispatchers' Ass'n*, No. 89-1027 (U.S.) | 1 |
| *Schweiker* v. *Gray Panthers*, 453 U.S. 34 (1981) | 6 |
| **Statutes** | |
| Interstate Commerce Act | |
| § 11341(a), 49 U.S.C. § 11341(a) | *passim* |
| § 11347, 49 U.S.C. § 11347 | *passim* |


No. 89-1028

# In The
# Supreme Court of the United States
# October Term, 1989

**CSX TRANSPORTATION, INC.,**
*Petitioner,*

*v.*

**BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,**
*Respondents.*

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

## PETITIONER'S SUPPLEMENTAL RESPONSE TO MOTION TO DISMISS

## INTRODUCTION

Respondent Brotherhood of Railway Carmen ("BRC") filed a Motion to Dismiss on May 24, 1990, asking the Court to dismiss the writs of certiorari granted herein on March 26, 1990,[1] on the ground that the issue presented in this case — whether

[1] The Motion to Dismiss was also filed by Respondent American Train Dispatchers' Association ("ATDA") in *Norfolk & Western Ry.* v. *American Train Dispatchers' Ass'n*, No. 89-1027 (U.S.).

§ 11341(a) of the Interstate Commerce Act ("ICA"), 49 U.S.C. § 11341(a), immunizes consolidating rail carriers from compliance with obligations arising from Railway Labor Act ("RLA") collective bargaining agreements — "has been rendered moot by recent actions of the Interstate Commerce Commission." Motion to Dismiss at 2. The "recent actions" on which BRC relied were a press release issued by the Commission on May 17, 1990, purporting to summarize the Commission's yet-to-be-issued decision on remand from the United States Court of Appeals for the District of Columbia Circuit in this case and the comments of the Commissioners at the public voting conferences concerning such decision.

Petitioner CSX Transportation, Inc. ("CSXT") and the Federal Respondents promptly filed their responses, opposing BRC's motion.[2] On June 20, 1990, this Court deferred further consideration of BRC's motion for 120 days. On September 19, 1990, BRC and ATDA filed a Supplemental Memorandum in support of their pending motion, in which they continue to assert that, in light of the Commission's decision, "the meaning of Section 11341(a) becomes virtually irrelevant." Supp. Mem. at 4.

There have been several developments in this case that have occurred since CSXT filed its initial response to BRC's motion that CSXT submits this Court should consider in ruling on that motion. In particular, they include: (1) the Commission's remand decision in *CSX Corp. — Control — Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc. ("CSX Corp. — Control")*, 6 I.C.C.2d 715, served June 21, 1990;[3] (2) the Commission's July 19, 1990, decision in *CSX Corp. — Control*, denying petitions for stays filed by CSXT, N&W and Southern;[4] and (3) the Petition in Support of Motion for Order to Interstate Commerce Commission to Conform Decision on Remand to Prior Court of

[2] Norfolk and Western Railway Company ("N&W") and Southern Railway Company ("Southern"), Petitioners in No. 89-1027, similarly opposed the identical motion in that case.

[3] The Federal Respondents have previously filed a copy of the Commission's decision with this Court.

[4] A copy of the Commission's decision is submitted herewith. App. 1a.



Appeals Decision, filed on August 6, 1990, by BRC and ATDA in the D.C. Circuit in *Brotherhood of Railway Carmen* v. *ICC*, Nos. 88-1724 and 88-1694.[5]

The Commission's two decisions, as well as the unions' petition to the D.C. Circuit, establish that the issue of the correct interpretation of ICA § 11341(a) and its application to obligations arising directly from RLA collective bargaining agreements remains very much alive and should be resolved by this Court. BRC's Motion to Dismiss should be denied.

**A. The Commission's Decision on Remand.**

On June 21, 1990, the Commission issued its decision on remand from the D.C. Circuit. In keeping with the Court of Appeals' mandate, the Commission acknowledged that it could not consider "the general question of the effect of § 11341(a) on the authority to modify existing contracts." 6 I.C.C.2d at 720. *See also* 6 I.C.C.2d at 722: "[I]n accordance with the opinion of the Court of Appeals, we do not here rely on § 11341 as a source of the authority to modify CBAs . . . ."; 6 I.C.C.2d at 745 (*semble*).

Instead, the Commission majority grounded its authority, and that of its arbitrators, to modify collective bargaining agreement provisions when necessary to permit ICC-approved rail consolidations on ICA § 11347 and the Commission's labor protective conditions imposed thereunder. 6 I.C.C.2d at 750-51. As the Commission observed, this was "an area the *Carmen* court did not reach." *Ibid.; see also* 6 I.C.C.2d at 729. In addition, the Commission held to its position that Congress had granted it authority under ICA § 11341(a) to exempt mergers and consolidations from the bargaining procedures of the RLA. 6 I.C.C.2d at 754. Thus, the Commission relied on § 11341 "as furnishing authority to replace RLA procedures, but in accordance with the opinion of the Court of Appeals, we do not rely on § 11341 as a basis for effecting modifications of CBAs." 6 I.C.C.2d at 756 n.34.

Despite its compliance with the mandate of the court of appeals, the Commission majority noted that it is currently arguing before this Court in the instant case that § 11341(a) does

[5] The unions' petition is submitted herewith. App. 14a.

in fact authorize the supersession of collective bargaining agreement terms inconsistent with Commission-approved consolidations:

> [I]n [Nos. 89-1027 and 89-1028] we are advancing the argument that the Court of Appeals was in error on this point and that § 11341 does furnish a further basis for modification of CBAs to the extent permissible under § 11347 and the labor protective conditions.

6 I.C.C.2d at 756 n.34.

### B. The Commission's Decision Denying the Railroads' Requests for a Stay.

Following the issuance of the Commission's remand decision, CSXT, N&W, and Southern filed petitions with the Commission seeking stays of the effective date of the remand decision since in it the Commission had vacated the arbitrated implementing agreement. The Commission rejected these requests in its July 19, 1990, decision. But, in doing so, it acknowledged that its reliance on ICA § 11347 as the source of its authority to supersede collective bargaining agreement terms had resulted from the Court of Appeals' mandate. It also indicated that, were the D. C. Circuit's interpretation of § 11341(a) to be reversed by this Court, the Commission would have to reconsider its analysis. As the Commission explained:

> [The Railroads] appear to be complaining that we deferred to the mandate of the *Carmen* court when we observed that court's holding that Section 11341 does *not* authorize the modification of CBAs. This we believe we are obliged to do as a matter of law unless and until we are successful in having that view declared erroneous by the Supreme Court.

App. 10a; emphasis in original. In addition, contrary to the Respondents' assertions in their Supplemental Memorandum, the Commission explained that it could not disagree with CSXT's statement that:

> If the Supreme Court rules, as both CSXT and the Commission have urged, that § 11341(a) broadly immunizes CSXT from compliance with "all legal obstacles", the Commission will need to reconsider its decision that such broad immunity was intended by Congress to be restricted nonetheless by a requirement that it be balanced with the obligations flowing from collective bargaining agreements.



App. 10a n. 9.[6]

### C. The Unions' Petition to the D.C. Circuit.

On August 6, 1990, BRC and ATDA filed a motion with the D.C. Circuit seeking the issuance of a special writ requiring the Commission to conform its ruling on remand to the judgment of the Court in *Brotherhood of Railway Carmen* v. *ICC*, 880 F.2d 562 (D.C. Cir. 1989), *cert. granted*, Nos. 89-1027, 89-1028 (March 26, 1990). In their petition in support of this motion, the unions argued that the Commission's decision "is plainly contrary to [the D.C. Circuit's] express findings and rationale in the *Carmen* case on the ICC's authority to abrogate Railway Labor Act agreements." App. 15a.

The unions alleged that the Commission had paid "lip service" to the D.C. Circuit's mandate, basing the authority to modify collective bargaining agreements on § 11347, rather than § 11341. App. 25a-26a. The unions argued to the D.C. Circuit that the Commission's decision on remand was inconsistent with that mandate because the ultimate source of the Commission's authority to supersede such agreements can only be § 11341(a):

> [T]he necessary statutory underpinning to any exercise of Section 11347 authority to override the RLA, must be Section 11341(a) and this court has already addressed the scope of that section's authority with respect to RLA agreements.

App. 26a.[7]

---

[6] Still pending before the Commission are petitions filed by CSXT, N&W, and Southern asking the Commission to reopen, reconsider, and clarify its remand decision.

[7] On September 10, 1990, the D.C. Circuit denied the unions' motion. In addition, on July 31, 1990, the Court of Appeals granted ICC's motion to withdraw its still-pending petition for rehearing. Accordingly, as the July 31, 1990, order provided, "These cases are now terminated."

## ARGUMENT

BRC's claim that the issue of the proper interpretation of ICA § 11341(a) has been rendered moot by the ICC's decision on remand is belied by that decision, the Commission's subsequent decision on the carriers' stay requests, and BRC's own filing with the D.C. Circuit. Each establishes that there continues to be a material controversy over the authority conferred on consolidating rail carriers by that section.

In its Motion to Dismiss, BRC speculated, on the basis of the ICC press release, that:

> The Commission evidently has determined that regardless of what may be this Court's ruling on the issue pending before it, it is section 11347, not section 11341(a), that governs and restricts its actions in merger and control cases with regard to employees' contract and Railway Labor Act rights.

Motion to Dismiss at 5. The actual Commission decision, however, establishes that its reliance on § 11347 as the source of the authority to modify collective bargaining agreement terms was forced on it by the restrictions of the Court of Appeals' mandate and the "law of the case".[8] As the Commission noted in that decision, it has filed a brief with this Court in support of CSXT, arguing that the D.C. Circuit's interpretation of § 11341(a) is erroneous. Moreover, the Commission continues to rely on § 11341(a) to override the RLA.

The continuing importance of the proper interpretation of § 11341(a) was further emphasized by the Commission in its July 19, 1990, decision denying the railroads' requests for a stay. While the Commission declined to issue such a stay, it acknowledged that its June 21, 1990, decision on remand would have to be reconsidered and the analysis contained therein revised if this Court were to reverse the D.C. Circuit's interpretation of § 11341(a), as CSXT and the Federal Respondents have argued.

---

[8] Mere compliance by the Commission with the D. C. Circuit's mandate does not moot consideration by this Court of the correctness of the Court of Appeals' decision. *See Schweiker* v. *Gray Panthers*, 453 U.S. 34, 42 n.12 (1981); *Maher* v. *Roe*, 432 U.S. 464, 468-69 n.4 (1977); *cf. Bakery Sales Drivers Local Union No. 33* v. *Wagshal*, 333 U.S. 437, 442 (1948).



BRC, in its Supplemental Memorandum at pp. 3-5, relies on various statements from the Commission's June 21, 1990, decision whereby the Commission, under the constraints of the Court of Appeals' decision, suggested that § 11341(a) authority would be limited by § 11347. But BRC conveniently avoids any reference to the Commission's July 19, 1990, decision, since that decision exposes the fallacy underlying BRC's arguments.

Finally, BRC itself has disavowed its claim in its Motion to Dismiss at 5 that "the issue of the meaning and effect of section 11341(a) is no longer material to the pending disputes." As noted above, BRC argued in its August 6, 1990, filing with the D.C. Circuit, less than two months ago, that *only* § 11341(a) can provide "the necessary statutory underpinning to any exercise of Section 11347 authority to override the RLA." App. 26a. In other words, BRC contended that, since the Court of Appeals found that the Commission did not have authority under § 11341(a), the Commission was precluded from finding that authority in § 11347. In light of this, BRC can hardly be heard now to suggest to this Court that the correct interpretation of § 11341(a) is of only academic interest, since according to BRC it is the only issue!

BRC's mootness argument is thus totally disingenuous. BRC continues to maintain that § 11341(a) does not provide authority to modify collective bargaining agreements, yet it argues that Supreme Court consideration of that seminal issue is moot because the ICC has found such authority to exist under § 11347 as well. At the same time, however, BRC argues that § 11347 does not provide statutory authorization to modify collective bargaining agreements because such authority can only be based in § 11341(a). BRC cannot have it both ways. Under guise of a mootness argument, BRC asks this Court to permit an erroneous appellate decision to remain in place so that BRC can use it to further restrict operation of the Interstate Commerce Act. BRC should not be permitted to succeed in this effort.

BRC's assertion that the issue of the Commission's authority under § 11341(a) to change the terms of a collective bargaining agreement is now moot is also clearly wrong in light of the effects of the Court of Appeals' decision on the Commission's decision on remand. The Court of Appeals' decision has resulted in the

Commission (1) departing from its prior view of its authority to change collective bargaining agreements; (2) formulating a more limited pronouncement of that authority; and (3) vacating the arbitrated implementing agreement that previously had been affirmed by the Commission. In short, the instrument by which CSXT had coordinated the Waycross car repair work into Raceland has been abrogated, and CSXT has been told that the coordination process, thought to have been completed more than three years ago, must now start over. All of these adverse results flow directly from the Court of Appeals' holding on the issue of the Commission's authority under § 11341(a) to change the terms of a collective bargaining agreement. That is the issue which is now before this Court.

Accordingly, there is no basis for BRC's assertion that the issue presented in this case has become moot or that this Court should dismiss the writ of certiorari granted in either No. 89-1027 or No. 89-1028.

## CONCLUSION

The Motion to Dismiss filed by Respondent Brotherhood of Railway Carmen should be denied.

Respectfully submitted,

JAMES S. WHITEHEAD
*(Counsel of Record)*
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703

NICHOLAS S. YOVANOVIC
JAMES D. TOMOLA
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

*Attorneys for Petitioner*
*CSX TRANSPORTATION, INC.*

September 27, 1990

# APPENDIX

BEST AVAILABLE COPY

DATE RELEASE
SERVICE DATE
JUL 20 1990

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 28905 (Sub-No. 22)

CSX CORPORATION — CONTROL —
CHESSIE SYSTEM, INC.
AND SEABOARD COAST LINE INDUSTRIES, INC.

Finance Docket No. 29430 (Sub-No. 20)

NORFOLK SOUTHERN CORPORATION — CONTROL —
NORFOLK AND WESTERN RAILWAY COMPANY AND
SOUTHERN RAILWAY COMPANY

Decided: July 19, 1990

On July 2, 1990, Norfolk & Western Railway Company and Southern Railway Company (jointly "N&W") filed a petition to stay the effectiveness of the commission decision served June 21, 1990 in these proceedings and reported at 6 I.C.C.2d 715 (the "June 21 Decision"). In that decision we reversed and vacated two arbitration awards and remanded the proceedings to the parties to continue the negotiation and arbitration procedures established under our labor protective conditions. 6 I.C.C.2d at 722, 757, 775.

N&W seeks a stay "pending completion of judicial and administrative proceedings following the Supreme Court's disposition of *Norfolk & Western v. American Train Dispatchers Association*, No. 89-1027, consolidated with *CSX Transportation, Inc. v. Brotherhood of Railway Carmen*, No. 89-1028."[1] Alternatively, N&W seeks a stay pending disposition of a petition to reopen and for reconsideration of the June 21 Decision. N&W

[1] On March 26, 1990, the Supreme Court granted petitions for writs of certiorari in Nos. 89-1027 and 89-1028 to review the decision of the Court of Appeals for the District of Columbia Circuit in *Brotherhood of Railway Carmen v. ICC*, 880 F.2d 562 (D.C. Cir. 1989) (the *"Carmen"* decision). In *Carmen*, the court of appeals reversed our earlier decisions in these proceedings reported at 4 I.C.C.2d 641 and 1080. See discussion in the June 21 Decision, 6 I.C.C.2d at 729-30, 756 n. 34.

filed that petition on July 11, 1990. On the same date, N&W filed a petition for stay pending judicial review indicating that it intends to file a petition for review of the June 21 Decision "in a court of appeals." Pet. at 4.

On July 2, 1990, CSX Transportation, Inc. ("CSX") also filed a petition to stay the June 21 Decision. CSX seeks to stay the effectiveness of that decision until the Commission disposes of a petition for reconsideration and clarification. That petition was filed by CSX on July 11, 1990. In addition, CSX filed a petition for stay pending judicial review on July 11, 1990, indicating that it intends to seek review in the United States Court of Appeals for the District of Columbia Circuit.[2] The Brotherhood of Railway Carmen and the American Train Dispatchers' Association (jointly "Rail Labor") filed responses to the petitions for stay on July 9 and 16, 1990.

Petitioners have not demonstrated entitlement to a stay by reference to each of the four factors identified in the seminal decision of *Virginia Petroleum Jobbers Association v. FPC,* 259 F.2d 921, 925 (D.C.Cir. 1958):

(1) that there is a strong likelihood that the movant will prevail on the merits;[3]

(2) that the movant will suffer irreparable harm in the absence of a stay;

(3) that other interested parties will not be substantially harmed; and

(4) that the public interest supports the granting of the stay.

---

[2] We will consider the arguments in the two petitions for stay pending judicial review, although we question whether judicial review is available at this time since we are only ruling on the petitions for stay. *United Transportation Union v. ICC,* 871 F.2d 1114 (D.C. Cir. 1989) (judicial review of agency decision not available to party that has also filed a petition for reconsideration that remains pending before the agency); *ICG Concerned Workers Association v. United States,* 888 F.2d 1455 (D.C.Cir. 1989) (same).

[3] In *Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.,* 559 F.2d 841, 843 (D.C. Cir. 1977), the court of appeals held that in a case in which the other three factors strongly favor interim relief, a stay may be granted if the movant has made a substantial case on the merits.



Analysis of the critical second factor essentially disposes of the stay petitions. Therefore, we first address whether petitioners have demonstrated that in the absence of a stay they will suffer irreparable harm.

## I. IRREPARABLE HARM

Although the concept of irreparable harm does not lend itself to exact definition, there are several indisputable principles that guide us in our determination whether this requirement has been met. First, the anticipated injury complained of must not be speculative. As stated in *Wisconsin Gas Co. v. FERC,* 758 F.2d 669, 673-74 (D.C.Cir. 1985) (citations omitted; emphasis in orginals in decisions quoted):

> [T]he injury must be both certain and great; it must be actual and not theoretical. Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time"; the party seeking injunctive relief must show that "[t]he injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm.

The court of appeals went on to describe the nature of the showing required of a party seeking the extraordinary remedy of a stay pending review (*id.* at 674):

> [T]he [petitioner must] substantiate the claim that irreparable injury is "likely" to occur. Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur. The [petitioner] must provide proof indicating the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. Further, the [petitioner] must show that the alleged harm will directly result from the action which the [petitioner] seeks to enjoin.

It is also well settled that economic loss of itself does not constitute irreparable harm. In *Sampson v. Murray,* 415 U.S. 61, 90 (1974), the Supreme Court quoted "the traditional standards of *Virginia Petroleum Jobbers"* on irreparable injury:

> The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

A corollary of this principle is that "mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Board v. Bannercraft Co.*, 415 U.S. 1, 24 (1974), citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52 (1938). Similarly, "[t]he usual time and effort required to pursue an administrative remedy does not constitute irreparable injury." *Randolph-Shephard Vendors of America v. Weinberger*, 795 F.2d 90, 108 (D.C. Cir. 1986).

Despite these well settled principles, petitioners premise their stay petitions on unsubstantiated and speculative allegations of injury and the expense and inconvenience of pursuing the remedies we have adopted, continued negotiation and, if necessary, arbitration. As the judicial precedents cited above clearly establish, neither of these contentions establish irreparable injury.

In its July 2 stay petition, CSX contends that, absent a stay, Rail Labor "*may* argue that the consolidation has to be undone;" or "*could* assert" that there was no ICC authority for the consolidation, or "*may* threaten a strike" (p. 2, empahsis added). Similarly, N&W asserts in its July 2 petition that "It *may* . . . *be suggested* that . . . the carriers now have an obligation to restore the *status quo ante*" (p. 9, emphasis added). Rail Labor responded (July 9 Response 8):

> [T]he claims of irreparable injury are based upon a possible strike, or return of the former separate operations to the *status quo ante* the transfers of work, etc. These claims of irreparable injury are wholly speculative and can be nothing more than that until [CSX and N&W] enter into negotiations . . .



We agree that petitioners have failed to demonstrate their feared injury is so real or imminent as to warrant the imposition of a stay delaying resolution of these proceedings.[4]

The likelihood that the transactions would ever have to be undone is diminished by the fact that, as petitioners correctly note, we did not find that the transactions were contrary to the standards that we enunciated in the June 21 Decision. As we stated (6 I.C.C.2d at 722), we were unable to affirm the arbitrators' implementation of those transactions because the arbitrators "based their decisions on pronouncements that the *Carmen* court found to be incorrect statements of the law and that we modify in this decision . . . ". The parties, and any arbitrators selected by the parties, are to be guided by the principles in the June 21 Decision. If, as petitioners contend, the transactions conform to those principles, there should be no need for any undoing of those transactions.[5]

The speculative nature of a potential strike is shown by the fact that there has been no threat, the remand was to the parties to "continue the implementing process *pursuant to Section 4 of*

---

[4] We certainly could not endorse N&W's suggestion that we wait until the Supreme Court reviews *Carmen* in Nos. 89-1027 and 89-1028 *and* all subsequent administrative and judicial proceedings are completed. We considered the Supreme Court's grant of the writs of certiorari when we issued the June 21 Decision and noted our own participation in the Supreme Court proceedings. 6 I.C.C.2d at 756 n.34. We obviously made a determination at that time that the public interest was better served by issuing the June 21 decision despite the pending Supreme Court review. N&W mentions no subsequent events that should influence us to reverse that determination. In fact, there are indications that resolution by the Supreme Court has become more indefinite. That Court has suspended briefing until October 1990 (Rail Labor Response at 5-6). Even if certain procedural objections to those proceedings are overcome and the Court hears argument on the merits of *Carmen*, the Court may not resolve the dispute. The last time the Supreme Court considered an ICC consolidation case involving labor issues, the Court did not reach the merits, but vacated the court of appeals' decision on procedural grounds. *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987).

[5] N&W assumes (July 21 Petition 9) that a remand directly to an arbitrator would remove uncertainty as to any undoing. Since, as we will discuss below, the arbitrator in the N&W proceedings has opined that an arbirtrator loses jurisdiction to rule on the merits once he renders his award, we believe that assumption is illusory.

*the [Commission's] New York Dock conditions"* (6 I.C.C.2d at 722, emphasis added), and Rail Labor has cooperated in abiding by the procedures established under the Commission's labor protective conditions throughout these extended proceedings.[6]

CSX finds irreparable harm in being "forced to engage in additional negotiations and arbitration . . . requir[ing] further expenditures of time and the limited resources of the parties . . . " July 2 Petition 10-11. N&W also finds irreparable injury in being required to negotiate with Rail Labor or "rearbitrate." July 2 Petition 5. But these are precisely the type of litigation or administrative expenses that the Supreme Court and the D.C. Circuit found did not constitute irreparable harm in the cases cited above. These expenses arise in connection with any decision that may be appealed or further litigated through appeal or remand. Accordingly, petitioners have not demonstrated that they will suffer irreparable injury in the absence of a stay.

## II. LIKELIHOOD OF SUCCESS ON THE MERITS

Petitioners have not made a strong showing that they are likely to prevail on the merits. While we are not here disposing of the two July 11 petitions seeking reopening, reconsideration, or clarification of the June 21 Decision, we will consider the allegations of error in those petitions to determine whether a substantial case on the merits has been made by petitioners.

CSX (Pet. for Recon. 7-8) and N&W (Pet. for Recon. 4-9) contend that the Commission committed material error when it failed to explain why the arbitration awards that were vacated did not meet the standards established in the June 21 Decision. As we have indicated above and at 6 I.C.C.2d at 722, we vacated the awards, not because we found them wanting under our newly-announced standards, but because the arbitrators in both decisions rested their awards on statements that the *Carmen* court found to be incorrect (see 6 I.C.C.2d at 729-30) and upon

---

[6] Rail Labor states in its July 19 Response (p. 3, emphasis in original):

> *If* at a future date events indicate that the carriers' speculation are about to be proved correct, they will have adequate remedies in the courts at that time, particularly in the court before which they will be appearing on review of the Commission's June 21, 1990 decision.



which we accordingly did not rely in our decision on remand (see 6 I.C.C.2d at 750-54). We fully articulated the reasons why we could not uphold the arbitrators' rulings.

We could have applied the new standards ourselves to the implementing agreements. We chose not to do so, however, because we believed this would diminish the freedom of the parties to negotiate as well as the role of arbitrators, upon whose expert guidance we intend to place great reliance. See discussion, 6 I.C.C.2d at 721-22, 753 n. 31. We stated there that we were relying on the experience of arbitrators, management and labor to properly implement the new policy, balancing the rights and accommodating the needs of labor and management. 6 I.C.C.2d at 721. We did not abuse our discretion by remanding these two transactions for further consideration by the parties most directly involved.[7]

N&W has a related procedural complaint (Pet for Recon. 18-20) about our remand "to the parties" (with arbitration, if necessary, 6 I.C.C.2d at 757) rather than directly to an arbitrator. According to N&W, "potential uncertainty" would be removed by remanding to the arbitrator responsible for the N&W implementing agreement, Referee Harris (Pet. at 19). In light of Referee Harris' recent statements in Finance Docket No. 30965, *Delaware and Hudson Railway Co., —Lease and Trackage Rights Exemption—Springfield Terminal Co.*, it appears to us that direct remand to the arbitrator could well create greater uncertainties. In an arbitration award filed March 13, 1990, in that proceeding, Referee Harris had the following comments on a remand to an arbitrator (p. 41):

---

[7] N&W argued as a further reason why the arbitrator's award in its case (the Harris award) should not be vacated that "the Harris award did not modify any contractual rights actually possessed by [the union]." Pet. for Recon. 6-8. Nevertheless, it appears clear that Referee Harris thought that contractual rights were being modified (see 6 I.C.C.2d at 727-28) and that the Commission believed an agreement was being modified (6 I.C.C.2d at 728-29), and that the *Carmen* court assumed the same (880 F.2d at 565). An argument that there was, in fact, no contract modification involved would appear to be most appropriately presented at the arbitration level, if the parties are unable to arrive at an agreement without resort to arbitration.

> Arbitrators, unlike judges, do not have award. "At common law, an arbitrator did not have authority to modify or correct an award once it had been rendered, because of the doctrine of *functus officia*; i.e. having rendered the award, the arbitrator's task has been fulfilled. Similarly, an arbitrator had no authority to commence a subsequent hearing." [Fairweather, *Practice and Procedure in Labor Arbitration*, 2nd Ed. (1983), at pp. 579-80.]
>
> While this general rule has been modified to allow for technical corrections such as correction of miscalculation of figures, mistakes in description, removal of portions of an award which exceeded the submissions, and corrections as to form, corrections may not be made in the merits of the award.

We are not accepting the foregoing statement as necessarily an accurate statement of the law, or as one binding upon the Commission in its dealings with arbitrators. We could not ignore this declaration, however, when made by one of the two arbitrators involved in these proceedings (a former Chairman of the Federal Mediation Board, as noted by N&W, July 2 Pet. 8 n. 8). It appeared to us when we decided this case that Referee Harris might decline a direct remand, leading to further delay. Pursuant to our June 21 Decision, the parties are free to seek arbitration as soon as negotiations reach an impasse.

CSX (Pet. to Recon. 8) and N&W (Pet. to Recon. 18) complain that we have not supplied adequate guidance for the parties or arbitrators. We are disappointed that petitioners are unable to discern sufficient guidance in our extensive decision. We commend to their attention particularly the "Summary of Conclusions," 6 I.C.C.2d at 718-22, and "The Problem Today - Our Resolution," 6 I.C.C.2d at 645-54, where we set forth standards



that we believe are more than adequate to guide arbitrators and the parties.[8]

N&W devotes a substantial portion of its Petition for Reconsideration (pp. 9-13) to the following alleged error (p. 10):

> The Commission apparently sees the Art. I, §2 requirement that collective bargaining rights be preserved as a device that may, in some contexts, grant to a union representing a group of employees of one railroad in a merged system the right to impose its contract on another railroad in the system.

N&W fails to furnish any citation to the June 21 Decision in which this proposition is stated. N&W does include two citations to that decision on the same page as the quotation, but N&W indicates that it agrees with the Commission in both instances. Since the Commission did not make the statement that N&W finds objectionable (as N&W seems to concede, using the terms "apparently," "may, in some contexts") in the June 21 Decision, we cannot find that N&W has made a substantial case for reopening and reconsideration of that decision on this basis.

Finally, both N&W (Pet. for Recon. 14-18) and CSX (Pet. for Recon. 4-7) assert that the Commission erred materially in its treatment of Section 11341(a), discussed in the final three pages of the June 21 Decision (6 I.C.C.2d at 754-56). If we understand the argument, petitioners disagree with our suggestion of a relationship between Section 11341(a) and Section 11347 (6 I.C.C.2d at 754); "We submit that Congress has given us the power in §11341(a) to exempt mergers and consolidations from the RLA [Railway Labor Act] at least to the extent of our authority

---

[8] Rail Labor's comments on a related issue are relevant here (July 9 Response 4):

> Both carriers complain that the Commission was in error in not making specific findings as to the failure of each of the disputed awards to meet the criteria now posited by the Commission. Such complaints denote a carrier view of the Commission's decision in these cases as changing nothing; that the references throughout the Commission's opinion to the importance of preserving collective bargaining is so much meaningless verbiage . . .

under §11347." Petitioners maintain that our authority is significantly broader and overcomes all legal obstacles including collective bargaining agreements (CBAs).

We fail to see how petitioners' view of the law constitutes a substantial case for reconsidering and modifying the June 21 decision. First, we ruled in that decision that CBAs could be modified pursuant to Section 11347, and did not rely on Section 11341(a) for that power. We found that our power under Section 11341(a) "reinforces" our authority under Section 11347, but "in accordance with the opinion of the Court of Appeals, we do not rely on §11341 as a basis for effecting modification of CBAs." 6 I.C.C.2d at 756. Since we did not rely on Section 11341(a), we question whether petitioners' objections even involve the "merits" of the June 21 decision. More significantly, they appear to be complaining that we deferred to the mandate of the *Carmen* court when we observed that court's holding that Section 11341 does *not* authorize the modification of CBAs. This we believe we are obliged to do as a matter of law unless and until we are successful in having that view declared erroneous by the Supreme Court.

Secondly, petitioners appear to be complaining that we have impermissibly limited the reach of Section 11341(a). As we have stated, to the extent we asserted Section 11341(a) authority at all we concluded that such authority must extend "at least to the extent" of our Section 11347 authority in the June 21 Decision. We also indicated in that decision that we are asserting more expansive Section 11341(a) authority before the Supreme Court. 6 I.C.C.2d at 756 n. 34. If that Court should rule that the *Carmen* court was in error, we would, of course, consider the appropriate scope of our authority under Section 11341(a).[9] Until such time,

---

[9] We do not disagree with the following statement of CSX (July 2 Pet. 8), but we cannot find it to be the type of challenge to the merits of the June 21 Decision that would justify a stay of that decision:

> If the Supreme Court rules, as both CSXT and the Commission have urged, that § 11341(a) broadly immunizes CSXT from compliance with "all legal obstacles", the Commission will need to reconsider its decision that such broad immunity was intended by Congress to be restricted nonetheless by a requirement that it be balanced with the obligations flowing from collective bargaining agreements.



we see no basis for petitioners' assertion that our discussion of Section 11341(a) in the June 21 Decision is in error. We fully considered these matters prior to issuance to our decision. We concluded that this was an insufficient reason to withhold the guidance to participants in railroad consolidations provided by our decision so that such transactions may go forward in the interim. Accordingly, petitioners have failed to demonstrate that there is a strong likelihood that they will prevail on the merits or even establish a substantial case on the merits.

## III. HARM TO OTHERS

The harm to other interested parties is not a substantial factor here. CSX reports that the employees covered by the Orange Book were never transferred (July 2 Pet. 4). Only two employees who moved in the N&W transaction are still employed, the remainder having retired (July 2 Pet. 8 n. 8).

## IV. THE PUBLIC INTEREST

The final hurdle for petitioner to overcome is to demonstrate that the public interest supports the granting of a stay. In our view the public interest requires that the petitions for stay be denied.

The significance of this factor was discussed in *Virginia Petroleum*, 259 F.2d at 925:

> Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interest of private litigants must give way to the realization of public purposes.

Furthermore, it is a "fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.' " *American Power and Light Co. v. SEC*, 329 U.S. 90, 112 (1946), quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 117, 194 (1941). In deciding whether to stay a Commission decision, a court will not substitute its judgment for that of the Commission in determining where the public

interest lies. *Atchison, Topeka and Santa Fe Railway Co., v. Wichita Board of Trade,* 412 U.S. 800, 825 (1973).

The Commission has conducted an extensive proceeding, involving the submission of briefs and oral argument before the full Commission, and we issued a lengthy opinion in furtherance of the public interest. We described the period of "essentially harmonious relationship between management and labor" prior to the 1980's (6 I.C.C.2d at 720, 740-745) and the subsequent period of conflict over the commands of the Interstate Commerce Act and the Railway Labor Act leading to substantial litigation (6 I.C.C.2d at 745-52). We explained the factors that we believed

> altered the balance between labor's legitimate right to bargain collectively under RLA procedures over changes in pay, rules and working conditions and management's need to implement operating changes to achieve the benefits of consolidation. 6 I.C.C.2d at 752.

We then said (*id.*) "We hope to restore that balance here." We do not know if we will be successful in our attempt to restore some harmony to labor-management relations in the all-important area of rail consolidations through the standards enunciated in the June 21 Decision, but we strongly believe our proposals should be tried. Acceding to petitioners' request for a stay would mean that the anticipated benefits to the railroad industry, labor, and the general public they serve would be indefinitely delayed. In our view, the public interest strongly requires that our proposals be applied now by rail management, labor and arbitrators. Moreover, as we have indicated, we believe the public interest strongly supports providing the guidance afforded by our June 21 Decision so that the sorts of transactions covered thereby may go forward pending review by the Supreme Court of the issues complained of by petitioners.

This decision will not significantly affect the quality of the human environment or energy conservation.

*It is ordered*:

1. The petitions for stay are denied.

2. This decision is effective on July 20, 1990.



By the Commission, Chairman Philbin, Vice Chairman Phillips, Commissioners Simmons, Lamboley, and Emmett. Commissioner Lamboley commented with a separate expression.

Sidney L. Strickland, Jr.
Secretary

---

*COMMISSIONER LAMBOLEY,* commenting:

I do not share the views expressed concerning the appropriateness of remanding this matter to the parties rather than to the arbitrator whose decision was at issue on review.[1] Where the Commission in reviewing a specific arbitral award finds error or other reason for remand it is proper to remand that award back to the arbitrator. This would avoid the procedural and substantive problems experienced in *Springfield Terminal.*[2]

---

[1] In one sense, an arbitrator acting under the authority of conditions imposed by the Commission pursuant to the Interstate Commerce Act — i.e., under the authority delegated by the Commission — is our agent, akin in standing to an ALJ.

[2] See FD No. 30965, *Delaware and Hudson Railway Company - Lease and Trackage Rights Exemption - Springfield Terminal Railway Company,* decisions served October 26, 1989, December 12, 1989, December 20, 1989 and January 9, 1990.

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

RECEIVED
AUG 06 1990
CLERK OF THE UNITED
STATES COURT OF APPEALS

No. 88-1724

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
*Petitioner,*

v.

INTERSTATE COMMERCE COMMISSION
AND THE UNITED STATES OF AMERICA,
*Respondents.*

No. 88-1694

AMERICAN TRAIN DISPATCHERS' ASSOCIATION,
*Petitioner,*

v.

INTERSTATE COMMERCE COMMISSION
AND THE UNITED STATES OF AMERICA,
*Respondents.*

ON PETITIONS FOR REVIEW OF ORDERS OF
THE INTERSTATE COMMERCE COMMISSION

PETITION IN SUPPORT OF
MOTION FOR ORDER TO INTERSTATE COMMERCE
COMMISSION TO CONFORM DECISION ON REMAND
TO PRIOR COURT OF APPEALS DECISION

Petitioners in this action the Brotherhood of Railway Carmen — Division of TCU and the American Train Dispatchers' Association (hereinafter "BRC", "ATDA" or "Petitioners") hereby submit this petition in support of their motion for a Special Writ to require the Interstate Commerce Commission ("ICC" or



"Commission") to conform its June 21, 1990 ruling in *CSX Corp. — Control—Chessie and Seaboard Coast Line Industries, Inc.*, 6 I.C.C.2d 715 (1990) (the "Commission's June 21 decision") to the judgment of this court in *Brotherhood of Railway Carmen v. ICC*, 880 F.2d 562 (D.C. Cir. 1989) ("*Carmen*") *cert. granted*, Supt. Ct. Nos. 89-1027 and 89-1028 (March 26, 1990).[1] Petitioners respectfully submit that the Commission's June 21 decision is plainly contrary to this court's express findings and rationale in the *Carmen* case on the ICC's authority to abrogate Railway Labor Act agreements.

## BACKGROUND

### a) The Carmen Decision

On July 25, 1989 this Court entered its decision in the *Carmen* case. That decision involved petitions from the ATDA and BRC for review of separate orders from the ICC concerning the ICC's authority to exempt a carrier which is party to a merger or consolidation "between railway carriers subject to approval under §11344 of the Interstate Commerce Act, 49 U.S.C. §10101, *et seq.* (the Act), from the provisions of (1) Collective Bargaining Agreements (CBA); and (2) the Railway Labor Act, 45 U.S.C. §151, *et seq.*" 880 F.2d at 563.

The *Carmen* case arose from two separate consolidations involving holding companies and rail carriers within the CSX Transportation, Inc. family ("CSX") and between rail carriers within the Norfolk Southern Corporation family ("NS"). In accordance with Section 11347 of the Interstate Commerce Act, 49 U.S.C. §10101, *et seq.* ("ICA"), the Commission imposed on these transactions its standard labor protective conditions applicable to railroad consolidations as set forth in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60, 84-90 (1979), *aff'd sub nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). It was the Commission's review of

[1] ATDA and BRC have moved for dismissal of the Supreme Court case as "moot" based at that time on the Commission's announcement of its then forthcoming decision on remand in the *Carmen* case. After consideration of such motion, and the responses thereto, the Supreme Court has deferred consideration of the motion for 120 days as well as further briefing on the merits.

the awards of arbitrators acting under these ICC imposed labor protective conditions which gave rise to the *Carmen* decision.

Specifically, approximately 5-6 years after the CSX and NS consolidations were consummated, the carriers separately decided to close certain facilities on their systems and to transfer the work and some of the affected employees to other locations on their rail system. These actions were subject to the *New York Dock* protective conditions imposed on the consolidations and pursuant to Article 4 of the *New York Dock* conditions, arbitrators were appointed by the National Mediation Board to devise implementing agreements which would outline the manner and methods by which the employees would be combined at the transferee work locations. In devising their respective implementing agreements the arbitrators, in essence, found that they, acting as agents for the ICC, had the power to abrogate provisions of collective bargaining agreements negotiated under the Railway Labor Act, 45 U.S.C. §151, *et seq.* ("RLA") as well as any other provision of the RLA, to the extent that these provisions inhibited the operational changes sought by CSX and NS.

The Commission, on petitions for review, upheld the arbitrators findings, and in the CSX arbitration even went beyond the arbitration decision by reversing the determination not to abrogate the provisions of a collective bargaining agreement prohibiting the transfer of employees (i.e., the "orange book").

In defending its decision to abrogate collective bargaining agreements which impeded the railroads operational transfer, the Commission relied upon Section 11341(a) of the ICA. That section exempts a railroad participating in an ICC-approved transaction "from the antitrust laws and from all other law, including State and municipal law, as necessary to let the person carry out the transaction . . ." 49 U.S.C. §11341(a).

This Court, after careful consideration of the legislative history of the ICA generally and Section 11341(a) specifically, as well as the history and purposes of the RLA concluded that Section 11341(a) "does not grant the ICC, its claimed power to override provisions of a CBA between a carrier and its employees." 880 F.2d at 573. This resolved the first issue before the court.



The second issue, which pertained to the ICC's power under Section 11341(a) to override RLA provisions that arguably impede mergers, was remanded to the ICC "in order that the agency may determine whether further proceedings are necessary." *Id.* The Court then addressed each petition on remand separately. With respect to the CSX matter, the Court reasoned that "the heart of the dispute before the ICC" was whether the collective bargaining agreement could be abrogated so that employees and work could be transferred in the operational consolidation; thus the RLA was implicated to the extent that its procedures must be followed and a new agreement reached before employees or work could be transferred. This Court then found that (880 F.2d at 573):

> Because the ICC, in response, started from a premise (that §11341(a) gave it the power to relieve CSX of its contractual responsibilities) and reached a conclusion (that the RLA could not stand in the way of that power) that we hold was in error, it appears that nothing turns any longer on its conclusion. We remand the record to the ICC for reconsideration, however, in order to enable it to assess the situation in the first instance.

Addressing the operational transfer at NS, the Court then considered the outstanding RLA issues finding that here too the effect of its ruling that the Commission could not abrogate the collective bargaining agreement may, for practical reasons having to do with administering the agreement in a location where there would be both covered and uncovered employees, moot any live RLA issue. *Id.* The court concluded by stating (*Id.*; emphasis supplied):

> In light of this uncertainty as to the effects of our ruling on the continued vitality of the disputes before us, we think it best to remand them for the ICC to determine *whether there is any live RLA issue remaining*. Should the ICC determine that further proceedings are necessary on the RLA issue, it should, on remand, either provide an explanation for its new position on that issue, or adhere to its prior position.

b) The Commission's Decision On Remand

In an order dated September 20, 1989, the Commission reopened the proceedings which led up to the *Carmen* decision. *CSX Corp.—Control—Chessie and Seaboard C.L.I.*, (not printed), served September 20, 1989. In so doing, the Commission announced its "intention to conduct a comprehensive examination of our authority under 49 U.S.C. §§11341, 11343 and 11347, etc. and the labor conditions we have customarily imposed in approving railroad consolidations."[2]

After consideration of the briefs of interested parties, including the BRC and ATDA, and after a hearing, the Commission, on June 21, 1990, issued its long-awaited decision on remand. Attached hereto as Exhibit 1. By way of a preface to its findings, the Commission summarized its conclusions in the following manner (6 I.C.C.2d at 718):

> First, any merger or consolidation of significance will require the modification of existing CBAs to carry out the transaction. Second, the procedures of the RLA are incompatible with the efficient consummation and effectuation of a merger or consolidation. The third, and perhaps most significant, proposition established here is that this dilemma was recognized by the industry more than 50 years ago and resolved through agreement between rail labor and management.

The Commission characterized the issue remanded to it by this Court as, "whether §11341(a) may operate to override the provisions of the RLA." Commission Decision at p. 754. Addressing this issue the Commission stated (*Id.*):

> Despite some labor suggestions to the contrary, we do not believe the Commission is prevented by the

[2] After issuance of the *Carmen* decision, petitions for rehearing and rehearing *en banc* were filed with the court by NS and CSX with the Commission filing a petition for rehearing only. The court denied, by order dated September 29, 1989, the petitions for rehearing and rehearing *en banc* from NS and CSX. Consideration of the Commission's petition for rehearing, however, was deferred pending release of the ICC'S decision on remand. Subsequently, the ICC in a motion served June 28, 1990, and after the issuance of its decision on remand, has moved the court for an order withdrawing its petition for rehearing.



> *Carmen* decision from finding that §11341(a) may displace Railway Labor Act procedures (that decision found no exemption for "contracts" because that term, unlike "law" does not appear in §11341(a)). We submit that Congress has given us the power in §11341(a) to exempt mergers and consolidations from the RLA at least to the extent of our authority under §11347. Thus we consider our §11341(a) authority in the context of mergers and consolidations a "mirror image" of our §11347 power. To the limited extent (as described in this decision or established by arbitrators) that we are able to act under §11347, we are also able to foreclose resort to RLA procedures.[3]

Relying on several grounds for this conclusion, the Commission indicated that its sources of authority were: (1) the language of Section 11341(a) and in particular that portion which exempts ICC approved transactions "from the antitrust laws and from all other law"; (2) the legislative history of the 1978 recodification of the ICA which in the interests of eliminating redundancy, according to the ICC, substituted the language "all other Federal law" for the former clause in Section 5(12) which stated "of all of the restraints, limitations, and prohibitions of law, Federal, State or municipal"; and (3) several court of appeals' decisions, considered by this Court in the *Carmen* decision including *Brotherhood of Locomotive Engineers v. C&NW*, 314 F.2d 424, 431-32 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963) and

[3] With respect to this finding, Commissioner Lamboley who concurred in part and dissented in part, observed:

> As noted, while apparently accepting the holding of the D.C. Circuit which denies Commission authority under the ICA to alter provisions of existing CBAs in order to implement approved transactions, the majority now defines the present problem in terms of preempting RLA procedures. This characterization sidesteps the court's ruling, but thereby creates the anomalous reasoning that while CBAs themselves may *not* be abrogated, the RLA procedures for which the CBAs have been ultimately derived may be preempted. For me, this is simply doing indirectly that which cannot be done directly. 6 I.C.C.2d at 758-759 (emphasis in original); *see* footnote 3, infra.

a concurring opinion in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987). 6 I.C.C.2d at 755.

The Commission conceded that its "assertion of this power [to modify agreements under Section 11347] is fairly recent; but then quickly added that [t]he fact that the Commission has disavowed this power in the past does not mean that the agency does not have such authority." *Id.* (citation omitted).

Addressing more specifically the question of modification of collective bargaining agreements, the Commission ruled it could modify such agreements to the extent necessary to allow a transaction to be effectuated pursuant to its authority under Section 11347. 6 I.C.C.2d at 721-22.[4] As the Commission sees it, its power under Section 11341(a) "reinforces" its authority under Section 11347. 6 I.C.C.2d at 756.

In what it considers to be a departure from its post-1983 decision, the Commission states that henceforth "only those changes in CBAs necessary to permit an approved transaction will be appropriate." 6 I.C.C.2d at 749. It is the Commission's opinion that this is the way things used to be done in mergers and consolidations in the past and that such approach reflects a "synthesis" between the RLA and ICA. *Id.* The Commission points to the "Washington Job Protection Agreement of 1936" as an example of such a synthesis. 6 I.C.C.2d at 741-42. In so doing, the Commission acknowledges that its recent interpretation, from 1983 onward, of its authority to override agreements was a departure from its prior position. 6 I.C.C.2d at 720-722, 752.

As the Commission acknowledges, (at 6 I.C.C.2d at 753) all this but particularly the Commission's new found assertion of its Section 11347 authority, must be considered in light of this court's guidance that, "we think it best for the ICC, if it has not abandoned its §11347 and §4 rationales altogether, to reconsider them in the first instance in light of the Supreme

[4] Commissioner Lambolely commented on this rationale by stating:

> Legally, §11347 does not provide the scope of authority urged in this decision to support its procedural or substantive determination . . . The basic authority to do that must be found in §11341(a) and that is truly at issue. Commission Decision at p. 774.



Court's intervening decision in *P&LE [Pittsburgh & Lake Erie R.R. Co. v. RLEA*, 105 L. Ed.2d 415 (1989)] rejecting the ICC's related position." 880 F.2d at 754. In the Commission's view, "P&LE is factually distinguishable" because there no labor protections were imposed and Section 11347 was not involved. 6 I.C.C.2d at 753. Therefore, according to the Commission, its current position that Section 11347 permits the modification of RLA agreements "is not inconsistent with that case." *Id.* It is asserted that the current ICC approach of overruling collective bargaining agreements to the extent necessary to allow a transaction to be effectuated, is consistent with the *P&LE* decision because it represents "an accommodation of the two statutes." *Id.* at 754.[5]

In concluding, the Commission reversed and vacated the arbitration awards which had given rise to the original petitions, and then "remanded to the parties to continue the implementing process in accordance with Section 4 of the *New York Dock* conditions through further negotiations or arbitration, if necessary, to reach new implementing agreements in accordance with the standards set forth in this decision." 6 I.C.C. 2d at 757.

C) Subsequent Developments Since The Commissions' June 21 Decision

Both NS, through its subsidiary carriers Norfolk and Western Railway and Southern Railway, and CSX filed petitions on July 2, 1990 with the ICC to stay the June 21 decision. NS sought a stay pending completion of judicial and administrative proceedings following the Supreme Court's disposition of *Norfolk & Western v. American Train Dispatchers Association*, Sup. Ct. No. 89-1027, consolidated with *CSX Transportation, Inc. v. Brotherhood of Railway Carmen*, Sup. Ct. No. 89-1028. NS also, as did CSX, sought, on July 11, 1990, a stay pending disposition of a petition for reconsideration of the June 21 Commission

[5] In response, Commissioner Lamboley states:

> This is *not* a case which harmonizes "complementary regimes." Rather, in claiming preemption authority under §11347 its logic creates conflict both *internally* between §2 and §4 of the New York Dock conditions, and *externally* between the ICA and the RLA statutes, all of which flow from the common origins and public purposes." 6 I.C.C.2d at 744 (emphasis in original).

Decision. On July 11, 1990, NS and CSX filed petitions for a stay pending judicial review.

In a decision served on July 20, 1990, the Commission denied the petitions for stay filed by CSX and NS.

## ARGUMENT

### THE COMMISSION'S JUNE 21 DECISION FAILED TO COMPLY WITH THIS COURT'S REMAND ORDER AND CONSEQUENTLY IT SHOULD BE SET ASIDE AND THE COMMISSION DIRECTED TO ONLY TAKE SUCH FURTHER ACTION AS IS CONSISTENT WITH THE ORDER OF REMAND

This is one of those narrow class of cases where issuance of a Special Writ, pursuant to the court's jurisdiction under the All Writs Act, 28 U.S.C. §1651(a)[6], is "necessary to confine a lower court [here the Commission] to the terms of an appellate tribunal's mandate."[7] *Will v. United States* 389 U.S. 90, 95-96 (1967). On partial remand from this court's decision in the *Carmen* case, the Commission has ruled that it may abrogate RLA collective bargaining agreements to permit a railroad merger or consolidation subject to its jurisdiction to be carried out. 6 I.C.C.2d at 718, 721, 722, 749 ("changes in CBA is necessary to permit an approved transaction will be appropriate"), 750, 752, 754. Such findings, petitioners submit, are directly contrary to both the "letter [and] spirit"[8] of the court's mandate in the *Carmen* decision. Thus, while the holding in *Carmen* was based on the

---

[6] 28 U.S.C. §1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

[7] Because this case concerns the Commission's decision on remand of the record from the court of appeals, that line of cases which provides that a special writ is not available unless it is demonstrated that appeal is an inadequate remedy and irreparable harm would result (*see* e.g., *In Re Thornburgh*, 869 F.2d 1503, 1507 (D.C. Cir. 1989) is inapplicable. That doctrine does not apply to cases on remand.

[8] *Mid-Tex Electric Cooperative, Inc. v. FERC*, 822 F.2d 1123 (D.C. Cir. 1987), *quoting, City of Cleveland v. FPC*, 561 F.2d 344, 346 (D.C. Cir. (1977)) ("City of Cleveland").



Commission's authority under Section 11341(a), the court made plain that "we can not impute to Congress the intention to make the bargained-for provisions of a CBA contingent upon their not later becoming inconvenient to the full realization of operating economies that a merger might make possible . . . *We simply do not think that Congress has lodged any such power in the ICC, . . .*" 880 F.2d 570. (citations omitted) (emphasis supplied).

It is well established that a decision of a federal appellate court "establishes the law binding further action in the litigation by another body subject to its authority."[9] *City of Cleveland*, 561 F.2d at 346; *Briggs v. Pennsylvania R.R.*, 334 U.S. 304, 306 (1948) ("In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court. The rule of these cases has been uniformly followed in later days . . . [and] We do not see how it can be questioned at this time"); *United States v. United States Dist. Court*, 334 U.S. 258, 263-264 (1948) ("It is, indeed, a high function of mandamus to keep a lower tribunal from interposing unauthorized obstructions to enforcement of a judgment of a higher court"). Under this doctrine the lower court, or in this case the Commission, "is without power to do anything which is contrary to either the letter or the spirit of the mandate construed in the light of the opinion of [the] court deciding the case." *City of Cleveland* supra at 346, *quoting, Yablonski v. UMW*, 454 F.2d 1036, 1038 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972). Thus, as petitioners have shown above, this court's exercise of authority under the All Writs Act "may appropriately be utilized to correct a misconception of the scope and effect of the appellate decision." *City of Cleveland* at 346 quoting *Yablonski* supra at 1038. Moreover, it is beyond doubt that these principles are as equally applicable to review of an administrative agencies' decision as they are to review of the actions of a lower court. *See United Gas Improvement Co. v. Continental Oil Co.*, 381

---

[9] The fact that petitions for certiorari have been granted, although a decision on Rail Labor's Motion To Dismiss has been deferred until October, as has further briefing on the merits, has no impact on this court's authority to require the Commission to conform its decision on remand to the dictates of the *Carmen* decision. *See United States of America v. United States District Court*, 334 U.S. 258, 263 (1948); *National Labor Relations Board v. Holyoke Water Power Co.*, 793 F.2d 18 (1st Cir. 1986).

U.S. 392, 406 (1965); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, (1940); *City of Cleveland* at 346 ("These principles, so familiar in operation within the hierachy of judicial benches, indulge no exception for reviews of administrative agencies").

Thus, when this court addressed the scope of its partial remand to the Commission, it expressed strong doubt that as a result of its ruling, that the Commission could not modify RLA agreements under Section 11341(a) of the ICA which had the result of limiting how the carriers could proceed with their operational consolidation, there was "any live RLA issue remaining." 880 F.2d 573.[10] On remand, however, the Commission has undertaken an expansive review of its authority "under 49 U.S.C. §§11341, 11343 and 11347, etc., and the labor conditions we have customarily imposed in approving railroad consolidations." More importantly, whereas this court specifically found that "§11341(a) does not empower the ICC to override a CBA," (880 F.2d at 572) and more generally stated "we simply do not think that *Congress has lodged any such power in the ICC*" (880 F.2d at 570) (emphasis supplied) to override collective bargaining agreements, and even though the ICC could have raised its Section 11347 argument earlier but did not, the ICC has nonetheless charged ahead, doing that which it was forbidden to do by this court, and found that it can abrogate such agreements—albeit, the ICC claims under its authority under a separate statutory provision, Section 11347.

The Commission believes that such a conclusion is not precluded by this court's ruling in the *Carmen* decision by explaining (6 I.C.C.2d at 754)[11]:

---

[10] The Court, therefore, stated in pertinent part in its conclusion:

> We remand the records with respect to the ICC's RLA holdings in order that the agency may determine *whether further proceedings are necessary*. 880 F.2d 574 (emphasis supplied).

[11] Commissioner Lamboley, who concurred in part and dissented in part in the Commission's decision, commented on the Commission's claimed authority under Section 11347 by stating (6 I.C.C.2d at 774):

> Legally, §11347 does not provide the scope of authority urged in this decision to support its procedural or substantive determinations . . . The basic authority to do that must be found in Section 11341(a) and that is what is truly at issue.



> We submit that Congress has given us the power in §11341(a) to exempt mergers and consolidations from the RLA at least to the extent of our authority under §11347. Thus we consider our §11341(a) authority in the context of mergers and consolidations a "mirror image" of our §1347 power. *To the limited extent* (as described in this decision or established by arbitrators) *that we are able to act under §11347, we are also able to foreclose resort to RLA procedures.*

Aside from the fact that the Commission has attempted to resurrect its authority under Section 11341(a) by claiming that it retains authority to preempt RLA procedures[12], as opposed to contracts, and besides the fact that in a none to subtle way the Commission has also attempted to cling to its Section 11341(a) authority by marrying it to Section 11347 and stating that it is the "mirror image" of that provision, remarkably, the Commission has relied on a provision of the ICA for which this court has already observed it lacks such authority. While this court did not reach the merits of the ICC's Section 11347 argument that it displaced Rail Labor's RLA rights, the Court made plain its views indicating that on remand, 880 F.2d at 574 (emphasis supplied).

> In any event, *we think it best for the ICC, if it has not abandoned its §11347 and §4 rationales altogether*, to reconsider them in the first instance in light of the Supreme Court's intervening decision in *P&LE* rejecting the ICC's related position.

In sum, the Commission in its decision on remand has come to precisely the same result as that to which it was reversed by this court in *Carmen*. To be sure, the Commission pays lip

---

[12] On this point Commissioner Lamboley observes (6 I.C.C.2d at 758-59):

> As noted, while apparently accepting the holding of the D.C. Circuit which denies Commission authority under the ICA to alter provisions of existing CBA's in order to implement approved transactions, the majority now defines the present problem in terms of preempting RLA procedures. This characterization sidesteps the court's ruling, but thereby creates the anomalous reasoning that while CBAs themselves may not be abrogated, the RLA procedures from which the CBAs have been ultimately derived may be prempted. For me, this is simply the idea of doing indirectly that which cannot be done directly.

service to the *Carmen* decision and professes adherence to its mandate while explaining that its authority to modify agreements is now based on Section 11347, but the Commission cannot discard its Section 11341(a) authority completely and therefore argues that Section 11347 is its "mirror image." Reduced to its essence, this is because the necessary statutory underpinning to any exercise of Section 11347 authority to override the RLA, must be Section 11341(a) and this court has already addressed the scope of that section's authority with respect to RLA agreements. Moreover, as petitioners have argued in briefs to this court in the *Carmen* case, Section 11347 *preserves* collective bargaining agreements and therefore cannot, under any circumstances, provide the justification for their abrogation. *See* Opening Brief in Case No. 88-1694 at 21-29; Opening Brief in Case No. 88-1274 at 20-31, Reply brief at 16-20. Thus, the ICC's action on remand is at its root no more than an exercise in supplying reasons to support a pre-ordained result.[13] Moreover,

[13] Nor can the Commission credibly contend that its decision on remand represents a return to its prior position concerning the interface of the RLA and ICA in the context of mergers and consolidations, for it has done no such thing. Indeed, the Commission's review of its prior handling in this area exhibits a revisionist approach to such history, is rife with misstatements and unsupported assumptions and is, in any event, based only on assumption.

Thus, for example, the Commission, 6 I.C.C.2d at 740, states that for the period between 1940-80 "the disruptive effect on labor [from mergers and consolidations] *appears* to have been successfully handled through WJPA-type negotiation and aribtration" (emphasis supplied). In fact, such "disruptive effect" was resolved through direct negotiation between labor and management of attrition agreements and no thought was given to arbitration. This fact was recognized by Referee Harris who rendered the decision in the "Dispatchers Arbitration" reviewed by this court in the *Carmen* case. Referee Harris clearly stated, "Prior to 1981, the question of whether a carrier could, through a consolidation of forces, effect changes in rates of pay, rules or working conditions had never been raised *in a Section 4 proceeding.*" 6 I.C.C.2d at 727. (emphasis added) The ICC responded, in just one example of the many unfounded assumptions it makes concerning prior handling of mergers, "[t]his could be interpreted as indicating that arbitrators did not make such changes before 1981, but an equally plausible reading is that such changes were made and not challenged." 6 I.C.C.2d at 743, n.19. At another point, on the key issue of prior handling of RLA agreements by arbitrators the Commission states, *"we assume* they did what was necessary to carry out the merger . . . [and contracts] were *evidently* changed without resort to RLA procedures." 6 I.C.C.2d at 743. In short, the Commission's professed return to its prior policy is built upon unsupported assumptions which, in turn, are relied upon to reach inaccurate conclusions.



such results and reasons are directly contrary to this Court's decision in *Carmen* and the remand order therein.

Furthermore, this case is similar to other decisions of this court directing an agency to comply with the court's mandate and order of remand. Thus, in *City of Cleveland* the Federal Power Commission took an overly narrow reading of the court's order of remand for further rate proceedings, as the ICC has here in interpreting this court's ruling on the extent of its authority under Section 11341(a) and its ability to abrogate RLA agreements, and the court rejected the agency's interpretation stating, "the basic issue presented and decided loomed much larger." 561 F.2d 347. Indeed, the court opined, in a statement which petitioners submit has equal weight here, that (561 F.2d at 348 (citations omitted)):

> [t]he law of the case; . . . when used to express the duty of a lower court to follow what has been decided by a higher court at an earlier stage of the case, applies to everything decided, either expressly or by necessary implication.

Similarly, in *Potomac Electric Power Co. v. ICC*, 702 F.2d 1026, 1033 (D.C. Cir. 1983) in which, like here, an action was brought against the Commission for failure to comply, (*i.e.*, by delay) with a court order on remand, this court found that such delay violated, in part, its earlier mandate and ordered the Commission to reach a decision in reasonable time.[14] While the Commission's extended delay in the *PEPCO* case was certainly contrary to the court of appeals' remand order, that case, Petitioners submit, presents a less serious departure from the court's mandate than this one. *See also, American Trucking Association, Inc. v. ICC*, 669 F.2d 957 (5th Cir. 1982) (court of appeals enforces prior mandate by mandamus where rules and

[14] More specifically, the court rested its findings of jurisdiction on alternative grounds stating (702 F.2d at 1033):

> In summary, we find that the question whether the Commission has unreasonably delayed reaching a final decision is properly before us, either because such delay violated our earlier mandate or because it jeopardizes our future review of the final Commission decision.

policy statement adopted by ICC were found to be contrary to Motor Carrier Act of 1980 as interpreted in prior opinion).

In sum, the Commission is so committed to the result that it can modify RLA agreements, that its decision on remand flies in the face of this Court's mandate in *Carmen*. The Commission's thinly veiled contention that this authority is now based on Section 11347 of the ICA is contrary to logic, because Section 11347 does not, in itself, provide preemption authority, and the Commission's own statement that "Congress has given us the power in §11341(a) to exempt mergers and consolidations from the RLA at least at the extent of our authority under §11347." 6 I.C.C.2d at 754. Such flagrant disregard for findings of the *Carmen* decision mandate that this Court exercise its authority under the All Writs Act. Accordingly, the Commission must be required to conform its decision on remand to the court's findings in *Carmen*.

## CONCLUSION

As the foregoing establishes, the Commission has on remand clearly and plainly exceeded this court's findings in the *Carmen* case. Accordingly, the court should issue an order vacating the Commission's June 21 decision on remand and requiring it to comply with the finding in the *Carmen* decision.

Respectfully submitted,

/s/ WILLIAM G. MAHONEY
WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.
RICHARD S. EDELMAN
DAVID J. STROM

HIGHSAW, MAHONEY & CLARKE, P.C.
1050 17th Street, N.W.
Suite 210
Washington, D.C. 20036
(202) 296-8500

Attorneys for Petitioners
ATDA and BRC

Date: August 3, 1990

(14) (14)

Nos. 89-1627 and 89-1628

FILED
SEP 28 1990
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1990

---

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.,
PETITIONERS

*v.*

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, ET AL.

---

CSX TRANSPORTATION, INC., PETITIONER

*v.*

BROTHERHOOD OF RAILWAY CARMEN, ET AL.

---

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## RESPONSE FOR THE FEDERAL RESPONDENTS TO THE SUPPLEMENTAL MEMORANDUM OF THE UNION RESPONDENTS IN SUPPORT OF THE MOTION TO DISMISS THE PETITIONS

---

ROBERT S. BURK
*General Counsel*

HENRI F. RUBIN
*Deputy General Counsel*

JOHN J. MCCARTHY, JR.
*Deputy Associate General Counsel*
*Interstate Commerce Commission*
*Washington, D.C. 20423*

JOHN G. ROBERTS, JR.
*Acting Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

BEST AVAILABLE COPY

## TABLE OF AUTHORITIES


| Cases: | Page |
|---|---|
| *Burke* v. *Barnes*, 479 U.S. 361 (1987) | 4 |
| *CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line, Inc.*, 6 I.C.C. 2d 715 (1990) | 2 |
| **Statutes:** | |
| 49 U.S.C. 11341 | 2, 4 |
| 49 U.S.C. 11341(a) | 3 |
| 49 U.S.C. 11347 | 2, 3 |

# In the Supreme Court of the United States

OCTOBER TERM, 1990

---

No. 89-1027

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL., PETITIONERS

*v.*

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, ET AL.

---

No. 89-1028

CSX TRANSPORTATION, INC., PETITIONER

*v.*

BROTHERHOOD OF RAILWAY CARMEN, ET AL.

---

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## RESPONSE FOR THE FEDERAL RESPONDENTS TO THE SUPPLEMENTAL MEMORANDUM OF THE UNION RESPONDENTS IN SUPPORT OF THE MOTION TO DISMISS THE PETITIONS

---

In a supplemental memorandum filed September 19, 1990, respondents American Train Dispatchers' Association and Brotherhood of Railway Carmen (the union respondents) renew their contention that the writs of certiorari should be dismissed because the

question presented has become moot or has ceased to be an important federal issue. The union respondents' argument is based on the decision of the Interstate Commerce Commission, issued June 21, 1990, on remand from the court of appeals. *CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 6 I.C.C.2d 715.[1]

The union respondents assert that the question before this Court has become "virtually irrelevant" because the Commission's decision on remand "shifted the focus of the dispute in these cases from the scope of the Commission's authority under [49 U.S.C.] 11341(a) to the scope of its authority under [49 U.S.C.] 11347, an issue not reached below and not presented by petitioners to this Court." Supp. Mem. 4. In particular, the union respondents point to the Commission's statement that "whatever the extent of [the Commission's] authority under * * * [§ 11341(a)], it is also defined and limited by the labor protective conditions adopted by the Commission pursuant to § 11347." 6 I.C.C.2d at 720. See also *id.* at 751 n.29 ("[W]hatever the extent of the exemptive authority conferred by * * * [§ 11341(a)] with respect to CBAs [collective bargaining agreements] in the context of mergers and consolidations, it does not go beyond the limits of our authority under § 11347 and the labor protective conditions.").

[1] The union respondents based their motion to dismiss, filed May 24, 1990, on a press release announcing the Commission's general conclusions. In response, the federal respondents suggested that consideration of the motion be deferred until the Commission published its decision. On June 11, the Court issued an order suspending further consideration of the motion to dismiss, and further briefing, for 120 days. 110 S. Ct. 2615 (1990). The federal respondents lodged copies of the Commission's decision with the Court on June 29.



The union respondents misinterpret the significance of the Commission's decision. As the Commission explained, the focus on Section 11347 was necessary to comply on remand with the mandate of the court of appeals. See *CSX Corp.*, 6 I.C.C.2d at 756 n.34 ("[W]e rely on § 11341 as furnishing authority to replace [Railway Labor Act] procedures, but in accordance with the opinion of the Court of Appeals, we do not rely on § 11341 as a basis for effecting modifications of CBAs."). The Commission expressly noted in its decision on remand that it is "advancing [in this Court] the argument that the Court of Appeals was in error on this point and that § 11341 does furnish a further basis for modification of CBAs to the extent permissible under § 11347 and the labor protective conditions." *Ibid.*[2]

One month later, on July 20, the Commission further explained its position, and removed any possible doubt as to mootness, in a decision denying petitioners' application for a stay of the June 21 decision.[3] In its July 20 decision, the Commission said:

[2] The Commission also noted that "[i]n cases which do not come within the [Washington Job Protection Agreement] or our WJPA-based labor conditions, * * * it may be necessary for us to assert the full measure of our authority under § 11341(a) to avoid frustrating the will of Congress." 6 I.C.C.2d at 756.

In a separate opinion concurring in part and dissenting in part, Commissioner Lamboley reasoned that the authority to displace Railway Labor Act procedures implies authority to conclude an "implementing agreement" that modifies existing CBAs. Commissioner Lamboley concluded that the authority to effect such modifications is to be found, if anywhere, only in Section 11341. See 6 I.C.C.2d at 759, 774.

[3] A copy of the July 20 decision is attached as an appendix to this response.

> [P]etitioners appear to be complaining that we have impermissibly limited the reach of Section 11341(a). As we have stated, to the extent we asserted Section 11341(a) authority at all we concluded that such authority must extend "at least to the extent" of our Section 11347 authority in the June 21 Decision. We also indicated in that decision that we are asserting more expansive Section 11341(a) authority before the Supreme Court. 6 I.C.C.2d at 756 n.34. If that Court should rule that the *Carmen* court was in error, we would, of course, consider the appropriate scope of our authority under Section 11341(a). * * *

App., *infra*, 13a. Moreover, the Commission said it did not disagree with the statement that

> [i]f the Supreme Court rules, as both CSXT and the Commission have urged, that § 11341(a) broadly immunizes CSXT from compliance with "all legal obstacles," the Commission will need to reconsider its decision that such broad immunity was intended by Congress to be restricted nonetheless by a requirement that it be balanced with the obligations flowing from collective bargaining agreements.

App., *infra*, 13a n.9.

In short, the decisions of the Commission demonstrate that there is a "presently existing dispute * * * between the parties to this case" as to the interpretation of Section 11341. *Burke* v. *Barnes*, 479 U.S. 361, 364 (1987). Accordingly, the question before the Court is not moot.



For the foregoing reasons, it is respectfully submitted that the motion to dismiss the petitions should be denied.

JOHN G. ROBERTS, JR.
*Acting Solicitor General* *

ROBERT S. BURK
*General Counsel*

HENRI F. RUSH
*Deputy General Counsel*

JOHN J. MCCARTHY, JR.
*Deputy Associate General Counsel*
*Interstate Commerce Commission*

SEPTEMBER 1990

---

* The Solicitor General is disqualified in this case.

**APPENDIX**

## INTERSTATE COMMERCE COMMISSION

---

Finance Docket No. 28905 (Sub-No. 22)

CSX CORPORATION—CONTROL—CHESSIE SYSTEM, INC. AND SEABOARD COAST LINE INDUSTRIES, INC.

Finance Docket No. 29430 (Sub-No. 20)

NORFOLK SOUTHERN CORPORATION—CONTROL—NORFOLK AND WESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY

---

## DECISION

Decided: July 19, 1990

[Service Date: July 20, 1990]

On July 2, 1990, Norfolk & Western Railway Company and Southern Railway Company (jointly "N&W") filed a petition to stay the effectiveness of the Commission decision served June 21, 1990 in these proceedings and reported at 6 I.C.C.2d 715 (the "June 21 Decision"). In that decision we reversed and vacated two arbitration awards and remanded the proceedings to the parties to continue the negotiation and arbitration procedures established under our labor protective conditions. 6 I.C.C.2d at 722, 757, 775.

N&W seeks a stay "pending completion of judicial and administrative proceedings following the Supreme Court's disposition of *Norfolk & Western v.*

*American Train Dispatchers Association*, No. 89-1027, consolidated with *CSX Transportation, Inc. v. Brotherhood of Railway Carmen*, No. 89-1028."[1] Alternatively, N&W seeks a stay pending disposition of a petition to reopen and for reconsideration of the June 21 Decision. N&W filed that petition on July 11, 1990. On the same date, N&W filed a petition for stay pending judicial review indicating that it intends to file a petition for review of the June 21 Decision "in a court of appeals." Pet. at 4.

On July 2, 1990, CSX Transportation, Inc. ("CSX") also filed a petition to stay the June 21 Decision. CSX seeks to stay the effectiveness of that decision until the Commission disposes of a petition for reconsideration and clarification. That petition was filed by CSX on July 11, 1990. In addition, CSX filed a petition for stay pending judicial review on July 11, 1990, indicating that it intends to seek review in the United States Court of Appeals for the District of Columbia Circuit.[2] The Brotherhood of

[1] On March 26, 1990, the Supreme Court granted petitions for writs of certiorari in Nos. 89-1027 and 89-1028 to review the decision of the Court of Appeals for the District of Columbia Circuit in *Brotherhood of Railway Carmen v. ICC*, 880 F.2d 562 (D.C. Cir. 1989) (the *"Carmen"* decision). In *Carmen*, the court of appeals reversed our earlier decisions in these proceedings reported at 4 I.C.C.2d 641 and 1080. See discussion in the June 21 Decision, 6 I.C.C.2d at 729-30, 756 n. 34.

[2] We will consider the arguments in the two petitions for stay pending judicial review, although we question whether judicial review is a available at this time since we are only ruling on the petitions for stay. *United Transportation Union v. ICC*, 871 F.2d 1114 (D.C. Cir. 1989) (judicial review of agency decision not available to party that has also filed a petition for reconsideration that remains pending before the agency); *ICG Concerned Workers Association v. United States*, 888 F.2d 1455 (D.C.Cir. 1989) (same).



Railway Carmen and the American Train Dispatchers' Association (jointly "Rail Labor") filed responses to the petitions for stay on July 9 and 16, 1990.

Petitioners have not demonstrated entitlement to a stay by reference to each of the four factors identified in the seminal decision of *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958):

(1) that there is a strong likelihood that the movant will prevail on the merits;[3]

(2) that the movant will suffer irreparable harm in the absence of a stay;

(3) that other interested parties will not be substantially harmed; and

(4) that the public interest supports the granting of the stay.

Analysis of the critical second factor essentially disposes of the stay petitions. Therefore, we first address whether petitioners have demonstrated that in the absence of a stay they will suffer irreparable harm.

## I. IRREPARABLE HARM

Although the concept of irreparable harm does not lend itself to exact definition, there are several indisputable principles that guide us in our determination whether this requirement has been met. First, the anticipated injury complained of must not be specu-

[3] In *Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977), the court of appeals held that in a case in which the other three factors strongly favor interim relief, a stay may be granted if the movant has made a substantial case on the merits.

lative. As stated in *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C.Cir. 1985) (citations omitted; emphasis in originals in decisions quoted):

> [T]he injury must be both certain and great; it must be actual and not theoretical. Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time"; the party seeking injunctive relief must show that "[t]he injury complained of [is] of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm.

The court of appeals went on to describe the nature of the showing required of a party seeking the extraordinary remedy of a stay pending review (*id.* at 674):

> [T]he [petitioner must] substantiate the claim that irreparable injury is "likely" to occur. Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur. The [petitioner] must provide proof indicating the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. Further, the [petitioner] must show that the alleged harm will directly result from the action which the [petitioner] seeks to enjoin.

It is also well settled that economic loss of itself does not constitute irreparable harm. In *Sampson v. Murray*, 415 U.S. 61, 90 (1974), the Supreme Court quoted "the traditional standards of *Virginia Petroleum Jobbers*" on irreparable injury:



> The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expanded in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

A corollary of this principle is that "mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Board v. Bannercraft Co.*, 415 U.S. 1, 24 (1974), citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52 (1938). Similarly, "[t]he usual time and effort required to pursue an administrative remedy does not constitute irreparable injury." *Randolph-Shephard Vendors of America v. Weinberger*, 795 F.2d 90, 108 (D.C. Cir. 1986).

Despite these well settled principles, petitioners premise their stay petitions on unsubstantiated and speculative allegations of injury and the expense and inconvenience of pursuing the remedies we have adopted, continued negotiation and, if necessary, arbitration. As the judicial precedents cited above clearly establish, neither of these contentions establish irreparable injury.

In its July 2 stay petition, CSX contends that, absent a stay, Rail Labor "*may* argue that the consolidation has to be undone;" or "*could* assert" that there was no ICC authority for the consolidation, or "*may* threaten a strike" (p. 2, emphasis added). Similarly, N&W aserts in its July 2 petition that "It *may . . . be suggested* that . . . the carriers now have an obligation to restore the *status quo ante*" (p. 9, emphasis added). Rail Labor responded (July 9 Response 8):

> [T]he claims of irreparable injury are based upon a possible strike, or return of the former separate operations to the *status quo ante* the transfers of work, etc. These claims of irreparable injury are wholly speculative and can be nothing more than that until [CSX and N&W] enter into negotiations . . .

We agree that petitioners have failed to demonstrate their feared injury is so real or imminent as to warrant the imposition of a stay delaying resolution of these proceedings.[4]

The likelihood that the transactions would ever have to be undone is diminished by the fact that, as petitioners correctly note, we did not find that the transactions were contrary to the standards that we enunciated in the June 21 Decision. As we stated (6

[4] We certainly could not endorse N&W's suggestion that we wait until the Supreme Court reviews *Carmen* in Nos. 89-1027 and 89-1028 *and* all subsequent administrative and judicial proceedings are completed. We considered the Supreme Court's grant of the writs of certiorari when we issued the June 21 Decision and noted our own participation in the Supreme Court proceedings, 6 I.C.C.2d at 756 n.34. We obviously made a determination at that time that the public interest was better served by issuing the June 21 decision despite the pending Supreme Court review. N&W mentions no subsequent events that should influence us to reverse that determination. In fact, there are indications that resolution by the Supreme Court has become more indefinite. That Court has suspended briefing until October 1990 (Rail Labor Response at 5-6). Even if certain procedural objections to those proceedings are overcome and the Court hears argument on the merits of *Carmen*, the Court may not resolve the dispute. The last time the Supreme Court considered an ICC consolidation case involving labor issues, the Court did not reach the merits, but vacated the court of appeals' decision on procedural grounds. *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987).



I.C.C.2d at 722), we were unable to affirm the arbitrators' implementation of those transactions because the arbitrators "based their decisions on pronouncements that the *Carmen* court found to be incorrect statements of the law and that we modify in this decision . . .". The parties, and any arbitrators selected by the parties, are to be guided by the principles in the June 21 Decision. If, as petitioners contend, the transactions conform to those principles, there should be no need for any undoing of those transactions.[5]

The speculative nature of a potential strike is shown by the fact that there has been no threat, the remand was to the parties to "continue the implementing process *pursuant to Section 4 of the* [*Commission's*] *New York Dock conditions*" (6 I.C.C.2d at 722, emphasis added), and Rail Labor has cooperated in abiding by the procedures established under the Commission's labor protective conditions throughout these extended proceedings.[6]

CSX finds irreparable harm in being "forced to engage in additional negotiations and arbitration . . . requir[ing] further expenditures of time and the limited resources of the parties. . ." July 2 Petition

[5] N&W assumes (July 21 Petition 9) that a remand directly to an arbitrator would remove uncertainty as to any undoing. Since, as we will discuss below, the arbitrator in the N&W proceeding has opined that an arbitrator loses jurisdiction to rule on the merits once he renders his award, we believe that assumption is illusory.

[6] Rail Labor states in its July 19 Response (p. 3, emphasis in original):

> *If* at a future date events indicate that the carriers' speculation are about to be proved correct, they will have adequate remedies in the courts at that time, particularly in the court before which they will be appearing on review of the Commission's June 21, 1990 decision.

10-11. N&W also finds ireparable injury in being required to negotiate with Rail Labor or "rearbitrate." July 2 Petition 5. But these are precisely the type of litigation or administrative expenses that the Supreme Court and the D.C. Circuit found did not constitute irreparable harm in the cases cited above. These expenses arise in connection with any decision that may be appealed or further litigated through appeal or remand. Accordingly, petitioners have not demonstrated that they will suffer irreparable injury in the absence of a stay.

## II. LIKELIHOOD OF SUCCESSON THE MERITS

Petitioners have not made a strong showing that they are likely to prevail on the merits. While we are not here disposing of the two July 11 petitions seeking reopening, reconsideration, or clarification of the June 21 Decision, we will consider the allegations of error in those petitions to determine whether a substantial case on the merits has been made by petitioners.

CSX (Pet. for Recon. 7-8) and N&W (Pet. for Recon. 4-9) contend that the Commission committed material error when it failed to explain why the arbitration awards that were vacated did not meet the standards established in the June 21 Decision. As we have indicated above and at 6 I.C.C.2d at 722, we vacated the awards, not because we found them wanting under our newly-announced standards, but because the arbitrators in both decisions rested their awards on statements that the *Carmen* court found to be incorrect (see 6 I.C.C.2d at 729-30) and upon which we accordingly did not rely in our decision on remand (see 6 I.C.C.2d at 750-54). We fully articulated the reasons why we could not uphold the arbitrators' rulings.



We could have applied the new standards ourselves to the implementing agreements. We chose not to do so, however, because we believed this would diminish the freedom of the parties to negotiate as well as the role of arbitrators, upon whose expert guidance we intend to place great reliance. See discussion, 6 I.C.C.2d at 721-22, 753 n.31. We stated there that we were relying on the experience of arbitrators, management and labor to properly implement the new policy, balancing the rights and accommodating the needs of labor and management. 6 I.C.C.2d at 721. We did not abuse our discretion by remanding these two transactions for further consideration by the parties most directly involved.[7]

N&W has a related procedural complaint (Pet for Recon. 18-20) about our remand "to the parties" (with arbitration, if necessary, 6 I.C.C.2d at 757) rather than directly to an arbitrator. According to N&W, "potential uncertainty" would be removed by remanding to the arbitrator responsible for the N&W implementing agreement, Referee Harris (Pet. at 19). In light of Referee Harris' recent statements in Finance Docket No. 30965, *Delaware and Hudson Railway Co.,—Lease and Trackage Rights Exemption*

---

[7] N&W argued as a further reason why the arbitrator's award in its case (the Harris award) should not be vacated that "the Harris award did not modify any contractual rights actually possessed by [the union]." Pet. for Recon. 6-8. Nevertheless, it appears clear that Referee Harris thought that contractual rights were being modified (see 6 I.C.C.2d at 727-28) and that the Commission believed an agreement was being modified (6 I.C.C.2d at 728-29), and that the *Carmen* court assumed the same (880 F.2d at 565). An argument that there was, in fact, no contract modification involved would appear to be most appropriately presented at the arbitration level, if the parties are unable to arrive at an agreement without resort to arbitration.

—*Springfield Terminal Co.*, it appears to us that direct remand to the arbitrator could well create greater uncertainties. In an arbitration award filed March 13, 1990, in that proceeding, Referee Harris had the following comments on a remand to an arbitrators (p. 41):

> Arbitrators, unlike judges, do not have continuing jurisdiction after rendering an award. "At common law, an arbitrator did not have authority to modify or correct an award once it had been rendered, because of the doctrine of *functus officia*; i.e. having rendered the award, the arbitrator's task has been fulfilled. Similarly, an arbitrator had no authority to commence a subsequent hearing." [Fairweather, *Practice and Procedure in Labor Arbitration*, 2nd Ed. (1983), at pp. 579-80.]
>
> While this general rule has been modified to allow for technical corrections such as correction of miscalculation of figures, mistakes in description, removal of portions of an award which exceeded the submissions, and correction as to form, corrections may not be made in the merits of the award.

We are not accepting the foregoing statement as necessarily an accurate statement of the law, or as one binding upon the Commission in its dealings with arbitrators. We could not ignore this declaration, however, when made by one of the two arbitrators involved in these proceedings (a former Chairman of the Federal Mediation Board, as noted by N&W, July 2 Pet. 8 n.8). It appeared to us when we decided this case that Referee Harris might decline a direct remand, leading to further delay. Pursuant to our



June 21 Decision, the parties are free to seek arbitration as soon as negotiations reach an impasse.

CSX (Pet. to Recon. 8) and N&W (Pet. to Recon. 18) complain that we have not supplied adequate guidance for the parties or arbitrators. We are disappointed that petitioners are unable to discern sufficient guidance in our extensive decision. We commend to their attention particularly the "Summary of Conclusions," 6 I.C.C.2d at 718-22, and "The Problem Today—Our Resolution," 6 I.C.C.2d at 745-54, where we set forth standards that we believe are more than adequate to guide arbitrators and the parties.[8]

N&W devotes a substantial portion of its Petition for Reconsideration (pp. 9-13) to the following alleged error (p. 10):

> The Commission apparently sees the Art. I, § 2 requirement that collective bargaining rights be preserved as a device that may, in some contexts, grant to a union representing a group of employees of one railroad in a merged system the right to impose its contract on another railroad in the system.

---

[8] Rail Labor's comments on a related issue are relevant here (July 9 Response 4):

> Both carriers complain that the Commission was in error in not making specific findings as to the failure of each of the disputed awards to meet the criteria now posited by the Commission. Such complaints denote a carrier view of the Commission's decision in these cases as changing nothing; that the references throughout the Commission's opinion to the importance of preserving collective bargaining is so much meaningless verbiage . . .

N&W fails to furnish any citation to the June 21 Decision in which this proposition is stated. N&W does include two citations to that decision on the same page as the quotation, but N&W indicates that it agrees with the Commission in both instances. Since the Commission did not make the statement that N&W finds objectionable (as N&W seems to concede, using the terms "apparently," "may, in some contexts") in the June 21 Decision, we cannot find that N&W has made a substantial case for reopening and reconsideration of that decision on this basis.

Finally, both N&W (Pet. for Recon. 14-18) and CSX (Pet. for Recon. 4-7) assert that the Commission erred materially in its treatment of Section 11341(a), discussed in the final three pages of the June 21 Decision (6 I.C.C.2d at 754-56). If we understand the argument, petitioners disagree with our suggestion of a relationship between Section 11341(a) and Section 11347 (6 I.C.C.2d at 754): "We submit that Congress has given us the power in § 11341(a) to exempt mergers and consolidations from the RLA [Railway Labor Act] at least to the extent of our authority under § 11347." Petitioners maintain that our authority is significantly broader and overcomes all legal obstacles including collective bargaining agreements (CBAs).

We fail to see how petitioners' view of the law constitutes a substantial case for reconsidering and modifying the June 21 decision. First, we ruled in that decision that CBAs could be modified pursuant to Section 11347, and did not rely on Section 11341 (a) for that power. We found that our power under Section 11341(a) "reinforces" our authority under Section 11347, but "in accordance with the opinion of the Court of Appeals, we do not rely on § 11341 as a basis for effecting modification of CBAs." 6



I.C.C.2d at 756. Since we did not rely on Section 11341(a), we question whether petitioners' objections even involve the "merits" of the June 21 decision. More significantly, they appear to be complaining that we deferred to the mandate of the *Carmen* court when we observed that court's holding that Section 11341 does *not* authorize the modification of CBAs. This we believe we are obliged to do as a matter of law unless and until we are successful in having that view declared erroneous by the Supreme Court.

Secondly, petitioners appear to be complaining that we have impermissibly limited the reach of Section 11341(a). As we have stated, to the extent we asserted Section 11341(a) authority at all we concluded that such authority must extend "at least to the extent" of our Section 11347 authority in the June 21 Decision. We also indicated in that decision that we are asserting more expansive Section 11341(a) authority before the Supreme Court. 6 I.C.C.2d at 756 n.34. If that Court should rule that the *Carmen* court was in error, we would, of course, consider the appropriate scope of our authority under Section 11341(a).[9] Until such time, we see no basis for petitioners' assertion that our discussion of Section 11341

---

[9] We do not disagree with the following statement of CSX (July 2 Pet. 8), but we cannot find it to be the type of challenge to the merits of the June 21 Decision that would justify a stay of that decision:

> If the Supreme Court rules, as both CSXT and the Commission have urged, that § 11341(a) broadly immunizes CSXT from compliance with "all legal obstacles", the Commission will need to reconsider its decision that such broad immunity was intended by Congress to be restricted nonetheless by a requirement that it be balanced with the obligations flowing from collective bargaining agreements.

(a) in the June 21 Decision is in error. We fully considered these matters prior to issuance to our decision. We concluded that this was an insufficient reason to withhold the guidance to participants in railroad consolidations provided by our decision so that such transactions may go forward in the interim. Accordingly, petitioners have failed to demonstrate that there is a strong likelihood that they will prevail on the merits or even establish a substantial case on the merits.

## III. HARM TO OTHERS

The harm to other interested parties is not a substantial factor here. CSX reports that the employees covered by the Orange Book were never transferred (July 2 Pet. 4). Only two employees who moved in the N&W transaction are still employed, the remainder having retired (July 2 Pet. 8 n.8).

## IV. THE PUBLIC INTEREST

The final hurdle for petitioner to overcome is to demonstrate that the public interest supports the granting of a stay. In our view the public interest requires that the petitions for stay be denied.

The significance of this factor was discussed in *Virginia Petroleum*, 259 F.2d at 925:

> Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interest of private litigants must give way to the realization of public purposes.

Furthermore, it is a "fundamental principle . . . that where Congress has entrusted an administrative



agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *American Power and Light Co. v. SEC*, 329 U.S. 90, 112 (1946), quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 117, 194 (1941). In deciding whether to stay a Commission decision, a court will not substitute its judgment for that of the Commission in determining where the public interest lies. *Atchison, Topeka and Santa Fe Railway Co., v. Wichita Board of Trade*, 412 U.S. 800, 825 (1973).

The Commission has conducted an extensive proceeding, involving the submission of briefs and oral argument before the full Commission, and we issued a lengthy opinion in furtherance of the public interest. We described the period of "essentially harmonious relationship between management and labor" prior to the 1980's (6 I.C.C.2d at 720, 740-745) and the subsequent period of conflict over the commands of the Interstate Commerce Act and the Railway Labor Act leading to substantial litigation (6 I.C.C. 2d at 745-52). We explained the factors that we believed

> altered the balance between labor's legitimate right to bargain collectively under RLA procedures over changes in pay, rules and working conditions and management's need to implement operating changes to achieve the benefits of consolidations. 6 I.C.C.2d at 752.

We then said (*id.*) "We hope to restore that balance here." We do not know if we will be successful in our attempt to restore some harmony to labor-management relations in the all-important area of rail consolidations through the standards enunciated in the June 21 Decision, but we strongly believe our

proposals should be tried. Acceding to petitioners' request for a stay would mean that the anticipated benefits to the railroad industry, labor, and the general public they serve would be indefinitely delayed. In our view, the public interest strongly requires that our proposals be applied now by rail management, labor and arbitrators. Moreover, as we have indicated, we believe the public interest strongly supports providing the guidance afforded by our June 21 Decision so that the sorts of transactions covered thereby may go forward pending review by the Supreme Court of the issues complained of by petitioners.

This decision will not significantly affect the quality of the human environment or energy conservation.

*It is ordered*:

1. The petitions for stay are denied.
2. This decision is effective on July 20, 1990.

By the Commission, Chairman Philbin, Vice Chairman Phillips, Commissioners Simmons, Lamboley, and Emmett. Commissioner Lamboley commented with a separate expression.

Sidney L. Strickland, Jr.
Secretary



COMMISSIONER LAMBOLEY, commenting:

I do not share the views expressed concerning the appropriateness of remanding this matter to the parties rather than to the arbitrator whose decision was at issue on review.[1] Where the Commission in reviewing a specific arbitral award finds error or other reason for remand it is proper to remand that award back to the arbitrator. This would avoid the procedural and substantive problems experienced in *Springfield Terminal*.[2]

---

[1] In one sense, an arbitrator acting under the authority of conditions imposed by the Commission pursuant to the Interstate Commerce Act—i.e., under the authority delegated by the Commission—is our agent, akin in standing to an ALJ.

[2] See FD No. 30965, *Delaware and Hudson Railway Company—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company*, decisions served October 26, 1989, December 12, 1989, December 20, 1989 and January 9, 1990.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20139

Nos. 89-1027 and 89-1028

FILED
NOV 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

---

NORFOLK AND WESTERN RAILWAY COMPANY and
SOUTHERN RAILWAY COMPANY,
*Petitioners,*

v.

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, *et al.*,
*Respondents.*

---

CSX TRANSPORTATION, INC.,
*Petitioner,*

v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
*Respondents.*

---

On Writs of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

---

## BRIEF FOR UNION RESPONDENTS

---

WILLIAM G. MAHONEY
(Counsel of Record)
JOHN O'B. CLARKE, JR.
HIGHSAW, MAHONEY & CLARKE, P.C.
1050 17th Street, N.W.
Suite 210
Washington, D.C. 20036
(202) 296-8500
*Attorneys for Union Respondents*

Date: November 9, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

## QUESTION PRESENTED

Whether Interstate Commerce Commission orders authorizing railroads to consummate 49 U.S.C. 11343(a) transactions exempt railroads participating therein from collective bargaining agreement obligations by virtue of the provisions of 49 U.S.C. 11341(a)?

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF AUTHORITIES | v |
| STATUTES INVOLVED | 1 |
| COUNTERSTATEMENT OF THE CASE | 1 |
| A. The CSX, Inc. Control And Merger And The Norfolk Southern Corp. Control | 2 |
| B. The Transfer Of SCL Work And Employees At Waycross, Georgia To C&O At Raceland, Kentucky; The Transfer Of N&W Work And Employees At Roanoke, Virginia To Southern At Atlanta, Georgia | 3 |
| C. The Arbitration Awards | 5 |
| D. The Commission Proceedings | 9 |
| E. The Court Of Appeals Decision | 10 |
| F. The ICC Decision On Remand | 10 |
| SUMMARY OF ARGUMENT | 16 |
| ARGUMENT | 18 |
| I. THE HOLDING OF THE COURT OF APPEALS THAT SECTION 11341(a) DOES NOT EMPOWER THE ICC TO OVERRIDE COLLECTIVE BARGAINING AGREEMENTS IN CONSOLIDATIONS RESULTING FROM A MERGER OR CONTROL IS CORRECT AND SHOULD BE AFFIRMED | 19 |
| A. The Court's Ruling On The Law Is Correct | 19 |
| B. The Court Correctly Declined To Defer To The Commission's Interpretation Of Section 11341(a) | 21 |
| II. SECTION 11341(a) DOES NOT AUTHORIZE THE COMMISSION TO OVERRIDE COLLECTIVE BARGAINING AGREEMENTS | 23 |

TABLE OF CONTENTS—Continued


| | Page |
|---|---|
| A. The Plain Language Of Section 11341(a) And Its History Do Not Support Its Use As A Basis For ICC Labor Relations Authority | 24 |
| B. The Commission Has No Expertise In Labor Relations | 32 |
| C. Congress Has Avoided Allowing The ICC Involvement In Labor Matters | 33 |
| D. Section 11347, Particularly As Amended In 1976 Prohibits The ICC From Modifying Or Eliminating Employees' Contract And Statutory Rights | 45 |
| III. AN INTERPRETATION OF SECTION 11341(a) AS RELIEVING A RAIL CARRIER OF ITS OBLIGATIONS TO EMPLOYEES UNDER ITS COLLECTIVE BARGAINING AGREEMENTS, WOULD BE CONTRARY TO THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES | 47 |
| CONCLUSION | 50 |
| APPENDIX A—Statutes And Constitutional Provision Relied Upon | |
| APPENDIX B—*New York Dock* Conditions (Relevant Excerpts) | |
| APPENDIX C—Washington Job Protection Agreement of 1936 (Relevant Excerpts) And Excerpts From WJPA Journal of Negotiations | |
| APPENDIX D—Washington Job Protection Agreement Docket No. 141 (Bernstein, Referee) (Relevant Excerpts) | |
| APPENDIX E—Former Section 5(12) of the Interstate Commerce Act | |
| APPENDIX F—Section 503 of the Regional Rail Reorganization Act of 1973 | |




TABLE OF AUTHORITIES


| *CASES:* | Page |
|---|---|
| *Air Line Pilots Ass'n v. CAB*, 667 F.2d 181 (D.C. Cir. 1981) | 40-41 |
| *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987) | 48 |
| *Brotherhood of Locomotive Engineers v. C&NW Ry.*, 314 F.2d 424 (8th Cir. 1963), *aff'd* 202 F. Supp. 277 (S.D. Iowa 1962), *cert. denied*, 375 U.S. 819 (1963) | 26, 41, 42 |
| *Brotherhood of Maintenance of Way Employes v. United States*, 366 U.S. 169 (1961) | 39 |
| *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962) | 20, 44 |
| *Central New England Ry. v. Boston & Albany R.R.*, 279 U.S. 415 (1929) | 50 |
| *Cherokee Nation v. Southern Kansas R.R.*, 135 U.S. 641 (1890) | 49 |
| *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) | 21 |
| *Delta Air Lines, Inc. v. CAB*, 543 F.2d 247 (D.C. Cir. 1976) | 41 |
| *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142 (1969) | 42-43 |
| *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) | 33 |
| *Grand Trunk Western R.R.—Merger*, 17 N.M.B. 282 (1990) | 9 |
| *ICC v. Railway Labor Executives' Ass'n*, 315 U.S. 373 (1942) | 40, 44 |
| *Louisville & Nashville R.R. v. Mottley*, 219 U.S. 467 (1911) | 48 |
| *Lynch v. United States*, 292 U.S. 571 (1934) | 48 |
| *Morton v. Mancari*, 417 U.S. 535 (1974) | 43 |
| *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 491 U.S. —— (1989) | 20, 45 |
| *Railway Labor Executives' Ass'n v. United States*, 379 U.S. 199 (1964) | 30 |
| *Regents of The Univ. Sys. of Ga. v. Carroll*, 338 U.S. 586 (1950) | 49 |
| *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) | 48 |
| *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) | 24 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Schwabacher v. United States*, 334 U.S. 182 (1948) | 21, 43 |
| *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118 (1948) | 21 |
| *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) | 20 |
| *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986) | 24 |
| *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298 (1954) | 37 |
| *Terminal R.R. Ass'n v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943) | 33 |
| *Texas & N.O.R. Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963) | 3, 41 |
| *Texas v. United States*, 292 U.S. 522 (1934) | 21, 36 |
| *United States v. Larionoff*, 431 U.S. 864 (1977) | 49 |
| *United States v. Lowden*, 308 U.S. 225 (1939) | 35-36, 40, 44 |
| *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980) | 24 |
| *Watt v. Alaska*, 451 U.S. 259 (1981) | 24 |
| *Wilson v. New*, 243 U.S. 332 (1917) | 48 |
| *INTERSTATE COMMERCE COMMISSION DECISIONS:* | |
| *Atchison, T. & S.F. Ry.—Merger*, 324 I.C.C. 254 (1965) | 13 |
| *Brandywine Valley R.R.—Purchase—CSX Transp., Inc. Lines in Florida*, 5 I.C.C.2d 764 (decided August 3, 1989; served August 11, 1989) | 11 |
| *Brotherhood of Locomotive Engineers v. C&NW Transp. Co.*, 366 I.C.C. 857 (1983) | 32 |
| *Canadian Pac. Ltd.—Purchase and Trackage Rights—Delaware & Hudson Ry.*, 7 I.C.C.2d 95 (1990) | 23 |
| *C&NW Ry.—Purchase—Minneapolis & St. L. Ry. Co.*, 312 I.C.C. 285 (1960) | 13 |
| *Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease*, 295 I.C.C. 696 (1958) | *passim* |




TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *CSX Corp.—Control—Chessie Sys. & Seaboard Coast Line Indus.*, 4 I.C.C.2d 641 (1988) | *passim* |
| *CSX Corp.—Control—Chessie Sys. & Seaboard Coast Line Indus.*, 363 I.C.C. 521 (1980) | 2 |
| *Denver and Rio Grande Western R.R.—Trackage Rights—Missouri Pac. R.R.*, Finance Docket No. 30000 (Sub-No. 18) (October 19, 1983) (not printed), *vacated and remanded sub nom. Brotherhood of Loc. Eng'rs. v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *vacated*, 482 U.S. 270 (1987) | *passim* |
| *Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228 (1967) | 13 |
| *Gulf, Mobile & Ohio R.R. Abandonment*, 282 I.C.C. 311 (1952) | 21 |
| *Gulf, Mobile & Ohio R.R.—Purchase*, 267 I.C.C. 265 (1947) | 3 |
| *Illinois Central Gulf R.—Trackage Rights—Chicago and Ill. Midland Ry.*, Finance Docket No. 28046 (February 22, 1977) (not printed) | 33 |
| *Leavens v. Burlington Northern, Inc.*, 348 I.C.C. 962 (1977) | 32 |
| *Maine Central R.R.—Exemption from 49 U.S.C. 11342 and 11343*, Finance Docket No. 30522 (September 16, 1985) (not printed), *aff'd per curiam sub nom. Railway Labor Execuitves' Ass'n v. ICC*, 812 F.2d 1443 (D.C. Cir. 1987) (Table) | *passim* |
| *New York Dock Ry.—Control—Brooklyn E. Dist. Terminal Co.*, 360 I.C.C. 60 (1979) | *passim* |
| *Norfolk & W. Ry. and New York, C. & St. L. R.R. —Merger*, 324 I.C.C. 1 (1964) | 13 |
| *Norfolk & Western Ry. and New York & St. Louis R.R.—Merger, Etc.*, 347 I.C.C. 506 (1974) | 26, 42 |
| *Norfolk & Western Ry.—Merger, etc., Virginian Ry.*, 307 I.C.C. 401 (1959) | 13 |
| *Ogeechee Ry.—Purchase and Trackage Rights—Missouri Pac. R.R., Etc.*, Finance Docket Nos. 31570 and 31571 (July 27, 1990) | 23 |
| *Pennsylvania R.R.—Merger—New York Central R.R.*, 328 I.C.C. 304 (1966) | 13 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Rio Grande Indus.—Purchase and Related Trackage Rights—Soo Line R.R.*, 6 I.C.C.2d 854 (1990) | 3 |
| *Rio Grande Indus.—Purchase & Trackage Rights—Chicago, Missouri & Western Ry. Co. Line Between St. Louis, MO and Chicago, IL*, 5 I.C.C.2d 952 (1989) | 23 |
| *Seaboard Coast Line R.R.—Merger—Piedmont & N. Ry.*, 334 I.C.C. 378 (1969) | 13 |
| *Southern Ry.—Control—Central of Ga. Ry. Co.*, 331 I.C.C. 151 (1967) | 30-31-32 |
| *Southern Ry.—Control—Central of Ga. Ry.*, 317 I.C.C. 557 (1962) | 30 |
| *St. Paul Bridge & Terminal Ry.—Control*, 199 I.C.C. 588 (1934) | 40 |
| *Valdosta Southern R.R.—Purchase*, 282 I.C.C. 705 (1952) | 3 |
| *Wilmington Terminal R.R.—Purchase and Lease—CSX Transp., Inc. Lines Between Savanna and Rhine, Etc.*, 6 I.C.C.2d 799 (1990) | 23 |


*CONSTITUTION, STATUTES AND OTHER MATERIALS:*


| | |
|---|---|
| U.S. Const. amend. v | 47, 48, 49 |
| Act of February 4, 1887, 24 Stat. 379 | 35 |
| Interstate Commerce Act, 49 U.S.C. §§ 10101, *et seq.* | *passim* |
| Section 11341(a), 49 U.S.C. § 11341(a) | *passim* |
| Section 11343, 49 U.S.C. § 11343 | *passim* |
| Section 11343(a), 49 U.S.C. § 11343(a) | *passim* |
| Section 11343(b), 49 U.S.C. § 11343(b) | 2 |
| Section 11344(c), 49 U.S.C. § 11344(c) | 3 |
| Section 11347, 49 U.S.C. § 11347 | *passim* |
| Section 5(2)(b) | 1, 39 |
| Section 5(2)(f) | 1, 39 |
| Section 5(12) | 25, 26 |
| Section 5(15) | 1 |




TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| Emergency Railroad Transportation Act of 1933, 48 Stat. 211 | 36, 37 |
| Section 7(a) | 38 |
| Section 7(b) | 38 |
| Section 10(a) | 37, 38 |
| Section 10(b) | 37 |
| Section 202 | 36 |
| Rail Passenger Service Act of 1970, 45 U.S.C. 501, *et seq.* | 45 |
| Section 405(b), 45 U.S.C. 565(b) | 45 |
| Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 | 12, 38 |
| Section 402(a) | 38 |
| Railway Labor Act, 45 U.S.C. §§ 151, *et seq.* | *passim* |
| Section 1 Fifth, 45 U.S.C. § 151 Fifth | 34-35 |
| Section 2 Seventh, 45 U.S.C. § 752 Seventh | 42 |
| Section 5 First, 45 U.S.C. § 155 First | 42 |
| Section 6, 45 U.S.C. § 156 | 42 |
| Section 7, 45 U.S.C. § 157 | 33, 42 |
| Section 7 First, 45 U.S.C. § 157 First | 42 |
| Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 986, *et seq.* | 27, 45 |
| Section 503 | 27 |
| Section 802 | 45 |
| Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895 | 46 |
| Transportation Act of 1920, 41 Stat. 456 | 25, 36 |
| Section 407 | 25 |
| Transportation Act of 1940, 54 Stat. 899 | 39 |
| Section 7 | 39 |
| *Hearings on H.R. 7650 Before the House Committee on Interstate and Foreign Commerce*, 73rd Cong., 2d Sess. (1934) | 27 |

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Hearings before the Surface Transportation Subcommittee of the Committee on Commerce, U.S. Senate, on S. 2188 and H.R. 9142*, 93rd Cong., 1st Sess. (1973) | 27-28 |
| H. Rpt. No. 95-1395, 95th Cong., 2d Sess. (1978) | 25 |
| S. Rpt. No. 459, 88th Cong., 1st Sess. (1963) | 35 |
| Pub. L. No. 95-473, 92 Stat. 1337 | 25 |
| 84 Cong. Rec. 9882 (1939) | 39 |
| Allen, *Railroad Line Sales*, 57 Transp. Pract. J. 255 (1990) | 50 |
| Rules of the Supreme Court | |
| Rule 14.1(a) | 18 |


## BRIEF FOR UNION RESPONDENTS

On March 26, 1990, this Court granted the petitions of CSX Transportation, Inc. (CSXT) and Norfolk and Western Railway Company ("N&W") and Southern Railway Company ("Southern," jointly "NS") for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the decision of that court in *BRC v. ICC*, 880 F.2d 562 (Pet. App. 1a-28a).[1] This brief is respectfully submitted by the Brotherhood of Railway Carmen ("BRC") and the American Train Dispatchers' Association ("ATDA") ("Union Respondents"), in opposition to the briefs filed by the Petitioners and by the Federal Respondents, United States and Interstate Commerce Commission ("ICC" or "Commission").[2]

### STATUTES INVOLVED

Section 11341(a) of the Interstate Commerce Act ("ICA" or "Act"), 49 U.S.C. § 11341(a), the provision upon which the court of appeals based its decision, is but one of several interdependent provisions of subchapter III of Chapter 113, which must be read and applied as a whole. All of the provisions of subchapter III were, prior to recodification, subsections and subparagraphs of one section of the Act.[3]

### COUNTERSTATEMENT OF THE CASE

These cases involve the extent of Commission authority, if any, under section 11341(a) of the Act, to modify or eliminate the statutory and contractual rights of rail-

[1] References to "Pet. App." are to the appendix to the petition in No. 89-1028.

[2] The United States did not participate in the proceedings below and the Commission did not seek review by this Court of the court of appeals decision.

[3] Section 11341(a) (formerly § 5(12), 90 Stat. 63); section 11343(a) (formerly § 5(2)(a), 63 Stat. 486); section 11343(b) (formerly § 5(b), *Id.*); section 11344(b)(1) (formerly § 5(2)(c), 63 Stat. 485); section 11344(c) formerly § 5(2)(b), *Id.*); and section 11347 (formerly § 5(2)(f), 90 Stat. 65). *See* App. A.

road employees whose employers in 1980 and 1982 placed their railroads under the separate common controls of Norfolk Southern Corporation ("NSC") and CSX, Incorporated ("CSX") after obtaining ICC authority to do so.

### A. The CSX, Inc. Control And Merger And The Norfolk Southern Corp. Control

In 1980, the ICC authorized CSX to obtain control of the railroads then controlled by the Chessie System and the railroads controlled by Seaboard Coast Line Industries.[4] *CSX Corp.—Control—Chessie Sys. & Seaboard Coast Line Indus.*, 363 I.C.C. 521 (1980) (*"CSX Control"*). That control was consummated in 1980 when CSX exercised the authority granted and assumed control and management of the operation and properties of the two railroad systems.

In 1982, the Commission authorized the NSC to assume control of the N&W, a product of numerous earlier mergers involving N&W, Virginian Railway, Wabash Railroad, and Nickelplate Railroad, among others, and the Southern Railway System and its numerous railroad subsidiaries. NSC effected the authority granted and assumed control and management of the operations and properties of N&W and Southern in 1982.

In order to make their respective controls of these railroads operationally and economically efficient, CSX and NSC had to have connections constructed between them, have these railroads operate over each others tracks,

[4] Chessie System controlled the Chesapeake and Ohio Railway Company ("C&O"). Seaboard Coast Line Industries controlled the Seaboard Coast Line Railroad Company ("SCL"), which had resulted from a merger of the Atlantic Coast Line Railroad Company ("ACL"), the Seaboard Air Line Railroad Company ("SAL") in 1962, and the Louisville and Nashville Railroad Company ("L&N"), among others. In December, 1982, SCL merged with L&N to form the Seaboard System Railroad, Inc. ("SSR"). In July, 1986, SSR changed its name to CSX Transportation, Inc. and in 1987, after the transfers giving rise to the *ATDA* case, C&O merged into CSXT, a petitioner herein.



jointly use some tracks, coordinate certain operations and, abandon lines that would become superfluous after common control was effected. The railroads which would become subject to CSX's control filed some 17 separate applications and the future subsidiary railroads of NSC filed some 6 applications for the required ICC approval of these merger objectives, all of which were granted along with the basic control applications filed by CSX and NSC.[5] A descriptive list of these separate applications is set forth in the ICC's summary of its decisions in these cases at 363 I.C.C. 521-25 (CSX) and 366 I.C.C. 173-74 (NSC).

In order to demonstrate to the Commission that their respective applications were "consistent with the public interest" as required by section 11344(c), 49 U.S.C. § 11344(c), CSX and NSC presented evidence of their intentions regarding future operations and consolidations that would improve service and efficiency. Neither NSC nor CSX requested the Commission to approve any of the proposed changes except those changes noted above for which prior ICC approval was required by the ICA; nor were they bound to carry out any of changes which they presented in support of their applications.[6]

### B. The Transfer Of SCL Work And Employees At Waycross, Georgia To C&O At Raceland, Kentucky; The Transfer Of N&W Work And Employees At Roanoke, Virginia To Southern At Atlanta, Georgia

The employees of all of the railroads involved in the subject transfers maintained through their union repre-

[5] No applications were submitted by any party seeking ICC approval to consolidate shops, yards, offices or other similar facilities, the activities complained of in the instant cases.

[6] The Commission has long held that its orders are permissive and when effected an applicant is bound only to adhere to the conditions attached to those orders. *See, e.g., Rio Grande Industries—Purchase & Trackage Rights—Chicago, Missouri & Western Ry. Co. Line Between St. Louis, MO and Chicago, IL*, 5 I.C.C.2d 952 (1989); *Tex. & N.O.R. Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151, 159 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963); *Valdosta Southern R.R.—Purchase*, 282 I.C.C. 705, 711 (1952); *Gulf, Mobile & Ohio R.R. Co.—Purchase*, 267 I.C.C. 265, 269 (1947).

sentatives collective bargaining agreements with their respective employers and, in the case of the SCL employees, maintained a separate agreement, known as the "Orange Book", from the color of its cover, which provides each employee covered by its provisions with a guaranteed income for the remainder of his or her working life. (Pet. App. 54a-55a.) Moreover, the protected employees were guaranteed that neither they nor their work would be transferred beyond the boundaries of the SCL system. *Id.* In exchange for those protections, SCL was granted the right to transfer work and employees within the merged ACL-SAL (SCL) system but not beyond it. (Pet. App. 83a.)

In August 1986, CSXT, purportedly pursuant to Article I, Section 4 of the *New York Dock* conditions[7] served notice on the Brotherhood of Railway Carmen that the SCL freight car heavy repair shop in Waycross, Georgia would be closed on December 31, 1986 and that the freight car heavy repair work as well as certain storeroom work at Waycross would be transfered to the C&O's Raceland, Kentucky repair facility and made subject to the C&O collective bargaining agreement. (Pet. App. 55a.) CSXT proposed to abolish 121 positions in the carman craft at Waycross and to establish 99 positions in the carmen craft at Raceland. All of the carman craft employees were subject to a collective bargaining agreement ("CBA") with CSXT and about one-half of those employees were also entitled to the protections of the "Orange Book," which, as noted above, prohibited the transfer of the work and the protected employees to Raceland. (*Id.*)

About two weeks after CSXT's intended transfer, N&W notified the American Train Dispatchers' Association of its intention to transfer all work of locomotive power distribution and assignment from the N&W at

[7] Article I, Sections 1(a), 2, 3 and 4 of the *New York Dock* conditions, 360 I.C.C. 60, 84 (1979), are set forth in Appendix B to this brief.



Roanoke, Virginia, where employees were represented by ATDA, to the Southern in Atlanta, Georgia, where the employees performing that work were unrepresented, being considered management personnel by Southern. The N&W employees would be considered for work in Atlanta. (J.A. 8-10).[8]

**C. The Arbitration Awards**

The parties were unable to reach agreement under section 4 of the *New York Dock* conditions. The respective disputes between the parties were submitted to arbitrators.[9] The BRC and the ATDA disputed the jurisdiction of the arbitrators to change the wages, rules or working conditions of employees or to eliminate any of their existing Railway Labor Act, 45 U.S.C. § 151, *et seq.* ("RLA") or CBA rights. (J.A. 12-13; Pet. App. 61a-62a.) Regarding the separate Orange Book protection applicable to half of the affected carman employees at Waycross, BRC argued that the arbitrator had no jurisdiction to affect any of the substantive rights provided employees by that agreement, and that "section 3 of the *New York Dock* conditions absolutely preserves workers' rights and benefits under existing protection agreements." (Pet. App. 64a.)

On behalf of the N&W employees it represented, the ATDA argued that the ICC could not eliminate the CBA rights or the collective bargaining rights the employees had established through their representation by ATDA by removing them and their work to a railroad on which they had no such established rights. (J.A. 19.)

The *Carmen* award was issued in March 1987 followed by the *ATDA* award in May 1987.

Holding that an arbitrator under section 4 was a "quasi-judicial extension of the ICC" and therefore

[8] References to "J.A." are to the consolidated Joint Appendix filed in these cases.

[9] Technically, the disputes were submitted to three-person committees: two partisan members and a neutral. The neutral is the effective arbitrator in such arrangements.

"must strictly follow the ICC's interpretation of its own authority" (Pet. App. 80a), the *Carmen* case arbitrator followed the ICC's decision in the *DRGW* case [10] which for the first time had held that section 11341(a) granted the Commission "expansive and self-executing authority to immunize an approved transaction from the Railway Labor Act and existing collective bargaining agreements to the extent the statute and terms of the agreements bar implementation of the transaction." (Pet. App. 80a.) Indeed, "[a]ccording to the ICC, Section 11341(a) insulates a transaction from all legal obstacles preventing or impeding effectuation." (*Id.*) The arbitrator then held that CSXT could transfer work and employees from the CSXT and its agreement to the C&O and its agreement because to permit the preservation of the CSXT employees' agreement rights, including their Orange Book guarantee that their work would not be transferred, "would for all practical purposes block the transaction," *i.e.*, the 1986 transfer of work and employees to the C&O. (Pet. App. 85a.) [11]

The arbitrator, however, felt that some of the employees' Orange Book rights could be protected without impeding the completion of the transfer. He found that without the right granted by the employees in 1962 to the then newly-merged SCL to "transfer work and workers throughout the merged (SAL-ACL) system . . . the point seniority terms of the [collective bargaining] working agreement would have restricted the Carriers from

---

[10] *Denver and Rio Grande Western Railroad Co.—Trackage Rights —Missouri Pacific Railroad Co.*, Finance Docket No. 30000 (Sub-No. 18) (October 19, 1983) (not printed). A copy of this unpublished ICC decision is attached to CSXT's Brief, filed February 21, 1989, in D.C. Cir. No. 88-1724.

[11] It is the Union Respondents' position that this is an erroneous use of the term "transaction" as found in sections 11341(a) and 11343. The term as used in the statute does not include changes made by a merged or commonly controlled railroad following, and as a result of, an approved and consummated statutory "transaction". *See infra*, 24-26, 29-30, 31-32.



moving employees." (Pet. App. 83a.) [12] The arbitrator concluded that the Orange Book prohibited the movement of work and workers beyond the limits of the former SCL property and therefore would bar transfers of work and employees to the C&O at Raceland, KY thereby "effectively thwart[ing] . . . [the] transfer[]." (*Id.* 83-84a.) He held that the employees' rights "must be subordinated to the Carriers' right to engage in the authorized *New York Dock* transaction" [13] by permitting the transfer of their work (*id.* 84a); but, he prohibited the transfer of the "Orange Book" employees because recognition of that particular agreement right of the employees would "only slightly impair the transaction." (*Id.*)

Some two months following issuance of the *Carmen* award, a second arbitrator issued his decision and award in the *ATDA* case. He noted that between "1981 and 1983 at least five arbitrators ruled that the ICC did not desire that changes of rates of pay, rules or working conditions, or of representation under Railway Labor Act, occur through arbitration under Section 4 of the New York Dock conditions." (*Id.*) He then proceeded to quote extensively from the Commission's 1985 *Maine Central* decision [14] in which the ICC held that it "is that [ICC] order, not RLA or WJPA, that is to govern employee-management relations in connection with the approved

---

[12] The railroads' practice of negotiating agreements such as the Orange Book and other similar agreements (*see* footnote 26, *infra*) to overcome the transfer restrictions in CBA's has been rendered unnecessary by the Commissions' expansive interpretation of its authority under section 11341(a).

[13] The arbitrator, following the ICC's rulings, viewed the 1986 transfer of work as having been authorized by the Commission rather than simply a result of the 1980 statutory transaction (the control) authorized by the Commission. *See infra*, 26, 31-32.

[14] *Maine Central R.R.—Exemption from 49 U.S.C. 11342 and 11343*, Finance Docket No. 30522 (September 16, 1985) (not printed), *aff'd per curiam sub nom. Railway Labor Executives' Association v. I.C.C.*, 812 F.2d 1443 (D.C. Cir. 1987) (Table). A copy of this unpublished ICC decision is attached as Addendum C to ATDA's Brief, filed March 21, 1989, in D.C. Cir. No. 88-1694.

transaction." (J.A. 17.) [15] The arbitrator also quoted that portion of the Commission's decision in the *Maine Central* case in which it made clear its intent to use section 4 of the *New York Dock* conditions to compel arbitration of new collective bargaining agreements (*id.*):

> Such a result [governance of labor relations by ICC orders] is essential if transactions approved by us are not to be subjected to the risk of nonconsummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transactions.

Holding that he derived his authority from the ICC; that "it is clear that the ICC believes that its order supercedes Railway Labor Act protection"; and, that the "conclusion is inescapable" that in the view of the ICC, "the inconsistencies between Sections 2 and 4 of the New York Dock conditions are to be resolved in favor of Section 4," the arbitrator held that the N&W could transfer the work and the employees to the Southern at Atlanta. (J.A. 19.) [16]

The arbitrator also held that depriving the affected employees of their existing collective bargaining representative as well as their collective bargaining agreement "does not change the rights of the individual em-

[15] "WJPA" refers to the "Agreement of May 1936, Washington, D.C." between all of the unions and most of the railroads providing protection for employees affected by railroads' "coordination" of facilities. It is the protective formula upon which all later protective formulae have been based and is still in effect.

[16] Union Respondents had contended that no inconsistency existed between Sections 2 (preservation of collective bargaining and contract rights) and 4 (arbitration of implementing agreements providing for the selection of forces and assignment of employees) of the *New York Dock* conditions when those provisions are applied in accordance with industry practice between 1940 and 1983. The work forces are selected to perform the coordinated or consolidated work and employees were assigned to those work forces. Their individual rights under their existing agreements, however, were preserved to them until changed by voluntary agreement.



ployees" (*id.* 19) because once on the property of Southern they could petition the National Mediation Board to *reestablish* their right to have ATDA represent them. (*Id.* 20.) [17] The arbitrator imposed the implementing agreement proposed by the N&W transferring the work and the employees to Southern without their existing agreement or representation rights.

### D. The Commission Proceedings

Both awards ultimately were appealed to the Commission. In the *Carmen* case, the Commission held that the arbitrator had correctly interpreted the Commission's view of its authority and affirmed the arbitrator on that point. (Pet. App. 43a.) However, it concluded that the arbitrator had committed "egregious error" in holding that the employees covered by the Orange Book could not be required to transfer to Raceland, Kentucky. (*Id.*) The "slight impairment of the transaction" found by the arbitrator was held to be an unacceptable standard as it would "permit[] a provision of a collective bargaining agreement to conflict with the implementation of an approved transaction" and thereby "effectively undercut the Commission's authorization of the transaction here." (*Id.* 43a-44a.) The Commission concluded that the evidence did not support the arbitrators finding of "slight impairment" of the transaction and reversed that finding, remanding the case to the arbitrator for a further review consistent with the Commission's decision.[18] (*Id.* 44a-45a.)

In reviewing the *ATDA* award, the Commission relied upon its decision in *Maine Central* and affirmed the

[17] The arbitrator also concluded that representation rights obtained through recognition by a railroad employer, as were ATDA's rights here, were somehow inferior to such rights obtained by election. The National Mediation Board disagrees. *Grand Trunk Western R.R. Co.—Merger*, 17 NMB 282, 303 (1990).

[18] The only evidence relied upon by the Commission to reach this conclusion was that related to a reduction in cost savings and operating efficiencies, neither of which it quantified. (*Id.* 44a.)

arbitrator's holding that the terms of its 1982 order approving the NSC control of N&W and Southern "and specifically the compulsory, binding arbitration required by Article I, Section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements" and any "action taken under our control authorization is immunized from conflicting laws by section 11341(a)." (No. 89-1027, Pet. App. 35a.) The Commission thought the arbitrator's award "somewhat confusing" on the issue of loss of representation but concluded the National Mediation Board could determine whether ATDA had any representative status on Southern. (*Id.* 38a.)[19]

**E. The Court Of Appeals Decision**

The Union Respondents sought review of the Commission's decisions in the court of appeals which heard the cases simultaneously and issued a consolidated opinion. (Pet. App. 1a-28a.)

The court held that "§ 11341(a) of the Act does not grant the ICC its claimed power to override provisions of a CBA between a carrier and its employees", reversed the ICC's decision and remanded the cases "with respect to the ICC's RLA holdings in order that the agency may determine whether further proceedings are necessary." (*Id.* 26a.)

**F. The ICC Decision On Remand**

Just nine days after the court of appeals issued its decision in the instant cases, the Commission issued a decision of major significance in the application and interpretation of section 11341(a) in a case involving the purchase by a shortline railroad of 102 miles of CSXT line in

[19] The issue of whether the employees' pre-existing right to representation by the ATDA had been preserved as *New York Dock*, Article I, Section 2 and 49 U.S.C. § 11347 requires, was not addressed by the ICC.



Florida.[20] The Commission held that this Court's *P&LE* decision (*see infra*, n.36) could not "be properly applied" to cases arising under section 11343(a), 49 U.S.C. § 11343(a), in which protection is afforded employees; that it did "not dispute the validity" of the lower courts' limited holding; that it had never "relied upon . . . § 11341(a) . . . to require that agreements be modified"; and that its authority to override CBA's was derived from section 11347.[21]

The Commission's decision following remand of these cases from the court of appeals is reported at 6 I.C.C.2d 715 ("remand decision"). It followed an order reopening the proceeding for public comment, a 3-hour oral argument held on January 4, 1990, before the full Commission by all interested parties, the submission of extensive documentation by rail labor of the legislative, judicial and administrative history of employee protection since its inception in the railroad industry and, the filing of post-argument briefs by the railroad management interests participating. (*Id.* 717-718.)[22]

In its remand decision, the Commission adhered to the ruling of the court of appeals that it was not authorized by section 11341(a) to override provisions of collective bargaining agreements, but concluded that such authority was unnecessary in any event since that authority had been afforded the Commission by Congress' inclusion of the employee protective provisions of section 5(2)(f)

[20] *Brandywine Valley Railroad Company—Purchase—CSX Transportation, Inc. Lines in Florida*, 5 I.C.C.2d 764 (decided August 3, 1989; served August 11, 1989).

[21] *Brandywine*, 5 I.C.C.2d at 772 n.5. The Commission now disputes the validity of the court of appeals' decision and contends that its "absolute authority" over labor management relations in cases subject to section 11343 of the Act is derived from both section 11341(a) and section 11347. *See, infra* 22.

[22] CSXT, NS, Union Pacific Railroad, Missouri Pacific Railroad, Conrail, Atchison, Topeka & Santa Fe Railway and the National Railway Labor Conference (rail management's national negotiating arm) presented oral argument.

in the 1940 Act (*id.* 750-751) and held that section 11341(a) empowered the ICC "to exempt mergers and consolidations from the RLA at least to the extent of our authority under § 11347." (*Id.* 754.)

The Commission's review of history compelled it to "concede that our assertion of this power is fairly recent, as both RLEA (Outline, 4-9) and the *Carmen* court assert." (*Id.* 755.)[23] It admitted that its decisions in 1983 (*DRGW*) and 1985 (*Maine Central*) had contributed to a deterioration of labor-management relations which had not theretofore existed in this area. (*Id.* 745-746.) The Commission noted that "a relatively harmonious working relationship when implementing ICC-approved consolidations [had existed] for almost forty years" prior to its 1983 and 1985 decisions and the inclusion of Section 2 in *New York Dock* in 1979. (*Id.* 745.)[24]

The Commission interpreted Section 2 of *New York Dock* as merely providing employees with "the opportunity to bargain collectively over their basic and continuing conditions of employment, as contemplated by the RLA" but permitting modification of collective bargaining agreements "when necessary to complete an approved merger or consolidation." (*Id.* 749.) To support that interpretation the ICC cited no evidence or authority, but relied solely upon assumptions of what "must have happened": the 1940-1980 arbitrators "*must have defined* them [the terms 'selection of forces' and 'assignment of

[23] Reference is to the Outline of Oral Argument submitted by rail labor at the oral argument of January 4, 1990, together with supporting documentation entitled "Materials in Aid of Oral Argument."

[24] The ICC's conclusion that the 1979 inclusion of Section 2 of the *New York Dock* conditions, as required by section 402(a) of the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. No. 94-210, 90 Stat. 31 ("4R Act"), contributed to labor unrest is based upon the assumption that the inclusion of section 2 added something new to the law instead of simply confirming the law as it had always been applied to that time.



employees'] broadly enough to include contract changes involving movement of work (and *probably* employees) as well as adjustments in seniority" (*id.* 721);[25] "[i]t *appears* that arbitrators, management and labor developed approaches in the 1940-1980 period for resolution of the inevitable conflicts with CBAs that permitted the carrying out of the transaction while maintaining labor peace" (*id.* 721-722);[26] between 1940 and 1980 "the disruptive effect on labor *appears* to have been successfully handled through WJPA-type negotiation and arbitration" (*id.* 740)[27]; "[m]ost of the changes were *presumably* made through WJPA (or *New Orleans*)[28] negotiations with only the more difficult issues being decided by an arbitrator" (*id.* 741), but the ICC cited no

[25] Attached as Appendix C to this brief are sections 4 and 5 of WJPA and excerpts from the Journal of the WJPA Negotiations in which its authors discuss the meaning of "selection of forces" and "assignment of employees". This and other excerpts from that Journal were supplied to the ICC at the January 4, 1990 argument.

[26] In the numerous merger and control cases which began with the *Norfolk & Western—Virginian* merger case in 1959 and ended in 1972 when the *Penn Central* met with disaster, labor and management executed so-called attrition agreements in which the railroads provided guarantees of lifetime employment in return for the right to move employees and their work throughout the merged or commonly-controlled systems. *Norfolk & Western Railway Company —Merger, etc., Virginian Railway Company*, 307 I.C.C. 401, 439 (1959); *Chicago & N.W. Ry. Co.—Purchase—Minneapolis & St. L. Ry. Co.*, 312 I.C.C. 285, 296 (1960); *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co.—Merger*, 324 I.C.C. 1, 50 (1964); *Atchison, T. & S. Ry. Co.—Merger*, 324 I.C.C. 254, 255, 261 (1965); *Pennsylvania R.R. Co.—Merger—New York Central R.R. Co.*, 328 I.C.C. 304, 313 (1966); *Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228, 277-279 (1967); *Seaboard Coast Line R.R. Co.—Merger—Piedmont & N. Ry. Co.*, 334 I.C.C. 378, 384-385 (1969).

[27] The only "WJPA-type negotiation and arbitration" which occurred during this period was the decision in WJPA Docket No. 141 in which the arbitrator rejected Southern's defense of 5(11) [11341(a)] against employees' WJPA claims. That decision was supplied to the ICC at the January 4, 1990 oral argument and is attached hereto in pertinent part as Appendix D.

[28] The predecessor of *New York Dock*.

such arbitrations; while the scope of the terms "selection of forces and assignment of employees" is "not well-defined . . . [i]t *must extend beyond* the mere mechanism for selection or assignment of employees, *and include* the modification of certain important contractual rights" [29] (*id.* 742); "[w]e *assume* they [labor and management] did what was necessary to permit the carrying out of the merger, including . . . those projects that were direct results of the merger" (*id.* 743); "[w]e *believe* that arbitrators have successfully followed this narrow and difficult path in the past . . ." (*id.* 753).[30] (Emphasis added.)

The only reference to any type of evidence or authority on which to base its assumptions as to what "must have happened" between 1940 and 1980 to maintain the labor-management harmony which then existed, is a list of 95 agreements relating to transfers submitted by CSX. (*Id.* 743.) The Commission concedes that the instances cited "cover[] a later period" and are referred to only for "some guidance" (*id.*) but, as Commissioner Lamboley's dissent notes (*id.* 764 n.55.), they afford no assistance on the issue of whether employees or unions had ever been *required* to arbitrate contract modifications or elimination prior to 1981. Only nine arbitrations were listed and none of them indicate whether they were voluntary or compulsory arbitrations.

As noted in the dissent of Commissioner Lamboley (*id.* 763), the Commission in this decision ignored its

---

[29] *But see*, App. C.

[30] Arbitrator Harris had stated in his *ATDA* award decision that "[p]rior to 1981, the question of whether a carrier could, through a consolidation of forces, effect changes in rates of pay, rules, or working conditions had never been raised in a section 4 proceeding." The ICC does not challenge the accuracy of Harris' statement but dismisses it with the comment that it could be read as "indicating that arbitrators did not make such changes before 1981 . . . [or] that such changes were made and not challenged." (*Id.* 743 n.10.) Such changes, of course, had been made, but only by agreement as noted in footnote 26, *supra*.



own initial decision creating the *New York Dock* conditions: [31]

> When adopting § 2, the Commission noted that it "appears acceptable to all parties" and rejected a labor proposed addition relating to [preserving] subcontracting agreements, stating that "the section, as now written, preserves all existing agreements and, therefore, the suggested language is redundant and unnecessary." *Id.* [360 I.C.C.] at 73.

The remand decision did not address the provisions of Section 3 of *New York Dock* [32] which preserve to employees covered by protective agreements the rights and benefits provided by those agreements and provide employees the option to choose between benefits of an applicable protective agreement [33] and those provided by the conditions imposed by the Commission.

The Commission's remand decision, although adhering to the court of appeals' ruling that section 11341(a) provided it no authority to override collective bargaining agreements, nevertheless accomplished the same result through its claim of virtually identical authority under section 11347. Its assertion of authority to approve by implication all future changes which a railroad may deem necessary to "complete," "implement" or "carry-out" an already consummated merger or control; its assumption that the terms "selection of forces and assignment of employees" required by section 11347 to protect the interests of employees in merger and control cases, "must extend beyond the mere mechanism for selection or assignment of employees, and include modification of certain important contractual rights" (*id.* 742); its reading of the plain language of section 2 of *New York Dock* as preserving employee rights only until it becomes "necessary" to modify or eliminate them; its

---

[31] *New York Dock Ry. Co.—Control—Brooklyn Eastern District Terminal Co.*, 360 I.C.C. 60 (1979).

[32] 360 I.C.C. at 84-85; Appendix B.

[33] In this case the "Orange Book".

failure or refusal to confront the plain language requirements of section 3 of *New York Dock*; its conclusion that section 11341(a) removes resort to RLA procedures to protect employees' contract and representation rights; and, the impossible burden it would place upon employees to show that movement of work and employees from one facility to another is not a "necessary" element in the consolidation of those facilities, all effect the same result as would a ruling that section 11341(a) expressly overrides all RLA and collective bargaining agreement rights of employees whenever a railroad wishes to take any action which could be said to be connected to the consummation of its ICC-approved merger or control.

## SUMMARY OF ARGUMENT

The ruling of the court of appeals that section 11341(a), 49 U.S.C. § 11341(a), "does not grant the ICC its claimed power to override provisions of a CBA between a carrier and its employees," is correct. As an implied repeal statute, section 11341(a)'s language must be narrowly construed and the plain language of that section does not indicate that its coverage extends past restraining or prohibitory laws to collective bargaining agreements. Additionally, there is no indication in the legislative history of section 11341(a) that it was intended to interfere with a carrier's collective bargaining agreement obligations and, the ICC, during the sixty-three years that passed between the initial enactment of section 11341(a)'s predecessor and the Commission's decision in the 1983 *DRGW* case, consistently disavowed any jurisdiction over labor relations matters by virtue of section 11341(a) or any other provision of the Interstate Commerce Act and, in the only case presented to it with the specific request to override agreements pursuant to section 11341(a), the ICC held that it had no authority to grant the requested relief. Indeed, the Commission repeatedly disclaimed any expertise whatever in labor relations matters. The court below concluded that in the instant cases the Commission departed from this long-standing position with no explanation, or even acknowledgment that it was doing so and, the Commission has since effectively acknowledged the accuracy of that conclusion.



The actions of the railroads during this period confirm the ICC's lack of authority to override contracts for, in order to consolidate operations and facilities following ICC approval of numerous mergers, they provided employees with guarantees of lifetime employment in return for the right to transfer work and employees across seniority district boundaries in contravention of existing collective bargaining agreements. Such agreements would have been unnecessary had section 11341(a) provided that relief.

The pre-1983 conclusions of the ICC are supported by the history of Congress' treatment of labor relations in the railroad industry. Congress, in its enactment of and amendments to the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, has deliberately and repeatedly refused to require compulsory arbitration of "major" disputes that the Commission now requires by its interpretation of the arbitration requirements of the *New York Dock* conditions.

In any event, section 11341(a)'s exemption authority extends only so far as is necessary for a railroad to carry out an approved transaction in accordance with the conditions imposed by the Commission. Section 11347, 49 U.S.C. § 11347, requires the Commission to impose conditions which preserve the collective bargaining agreement rights of employees and prohibits deprivation of any employees' rights under protective agreements such as the "Orange Book". It is illogical to conclude that conditions required by Congress to be attached to a permissive order can be considered as in conflict with the very order to which they must be attached.

The subject contracts rights of the affected employees are property rights and neither the ICA nor the *New York Dock* conditions provides compensation for the elimination of the prohibitions against transfers of work and employees contained in the CBAs and the Orange Book. Interpreting section 11341(a) as authorizing the elimina-

tion of those rights, particularly where the employees have no voice in accepting or rejecting the ICC order effecting that elimination, renders the validity of that section questionable under the due process and just compensation clauses of the Fifth Amendment. An alternative interpretation is available and should be adopted.

## ARGUMENT

The Petitioners and Federal Respondents seek reversal of the ruling of the court of appeals that section 11341(a) does not authorize the Commission to override provisions of collective bargaining agreements. They also seek remand of that ruling "for consideration of any remaining questions, including those that are now pending before the Commission and that may be raised in subsequent proceedings for judicial review." (FR 21-22.)[34]

In their motion to dismiss the writs of certiorari, the Union Respondents contended that the meaning and effect of section 11341(a) was no longer material to the disputes pending between them and CSXT and NS over the latters' right to ignore their contractual and RLA obligations to those employees. (Motion to Dismiss, 5.) Union Respondents remain of that view since the Commission held in its remand decision that whatever might be the meaning or effect of section 11341(a) standing alone, its authority to modify or eliminate the collective bargaining agreement rights of employees is provided, controlled and, limited by section 11347 (*id.* 720). However, the question whether the ICC is correct in now asserting that Section 11347—apart from Section 11341(a)—gives its arbitrators the power to override provisions in a CBA, was not considered by the court below and is not a question presented for review by the writs. *See* Rule 14.1(a) of the Rules of this Court.

[34] "FR" references are to the brief filed in these consolidated cases by the Federal Respondents on May 25, 1990. References to the separately filed briefs of Petitioners are "CSXT" and "NS", respectively.



### I. THE HOLDING OF THE COURT OF APPEALS THAT SECTION 11341(a) DOES NOT EMPOWER THE ICC TO OVERRIDE COLLECTIVE BARGAINING AGREEMENTS IN CONSOLIDATIONS RESULTING FROM A MERGER OR CONTROL IS CORRECT AND SHOULD BE AFFIRMED

#### A. The Court's Ruling On The Law Is Correct

The Federal Respondents characterize the ruling of the court below as holding that "the exemptions provided by Section 11341(a) do not apply to those laws governing enforcement of contractual obligations." (FR 21.) The court did not so hold but restricted itself to the very narrow ruling that "§ 11341(a) of the Act does not grant the ICC its claimed power to override provisions of a CBA between a carrier and its employees." (Pet. App. 26a.) It remanded the case to the Commission with respect to that agency's "RLA holdings in order that the agency may determine whether further proceedings are necessary." (*Id.*)[35]

As the court noted in its review of the legislative history of section 11341(a) (*id.* 13a-19a), Congress' emphasis has always been centered on the effort to ensure that no state or federal statute, particularly anti-trust statutes, could prevent the effectuation of a Commission order approving a section 11343 transaction. It noted that when an attempt was made to amend the RLA to provide the ICC power to suspend excessively generous wage agreements between railroad carriers and their employees it was rejected. (*Id.* 18a.)

The court reviewed the Commission's pre-1983 decisions and concluded that historically the ICC had held that section 11341(a) did not relieve carriers from collective bargaining agreements which limited transfers of employees, but that in its 1983 *DRGW* decision, it had departed from that view without explanation (*Id.* 21a-23a),

[35] The Commission's remand decision also holds that section 11341(a) enables the ICC to "foreclose [employees'] resort to RLA procedures" for redress of loss of contract rights. (6 I.C.C.2d 754.)

a conclusion with which the ICC now concurs. (Remand decision, 6 I.C.C.2d 755.) The court held that in failing to state any reason for its departure from precedent the Commission erred. Union Respondents respectfully submit that this conclusion of the court is correct. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962), quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947):

> "[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . . ."

The court then held that the Commission had erred in relying on section 11341(a) as providing it exemptive authority over collective bargaining agreements (Pet. App. 26a) and, in light of its holding on section 11341(a), the court believed it unnecessary to address "either the Unions' arguments that to do so [override collective bargaining agreement rights] would be unconstitutional or their claim that, in amendments to the Act in 1976, Congress specifically preserved employees' contractual rights." (*Id.*) The court declined to address the ICC's theory that the employee protective conditions required by Section 11347 are exclusive or that section 4 of *New York Dock* "gives the arbitration committee the 'absolute right' to effectuate the transfer of employees, and to override any contrary provisions of a CBA." (*Id.* 25a.) The court stated that the ICC had "not argued the first theory to us at all" (*id.*) and concluded that if it had "not abandoned its § 11347 theory and the § 4 rationales altogether," it should "reconsider them in the first instance in light of the Supreme Court's intervening decision in *P&LE* rejecting the ICC's related position.[36]

[36] *Pittsburgh & Lake Erie R. v. Railway Labor Executives' Association*, 491 U.S. —— (1989).



The court emphasized the fact that these cases did *not* involve the obstruction of an ICC order approving the merger and control of railroads as the carriers' transfers of work and employees took place "well after the consummation of the ICC-approved transactions[s] . . . ." (*Id.* 21a.) The court concluded that this fact alone reconciled this Court's decisions interpreting section 11341(a) with the result the court reached because in each of those cases[37] the "question of exemption arose before the consummation of the approved transaction." (*Id.*)

Union Respondents respectfully submit that the court of appeals decision in these cases is correct. As will be demonstrated below, whatever the Commission's exemptive authority may be in non-labor cases, the Congress did not grant, nor did it intend to grant, to the ICC authority to override the statutory and contract rights of employees before, during, or after consummation of a section 11343 transaction, by virtue of its enactment of the provisions in section 11341(a).

### B. The Court Correctly Declined To Defer To The Commission's Interpretation Of Section 11341(a)

The Federal Respondents and Petitioners argue that the Commission's conclusions regarding its authority are reasonable and therefore entitled to deference which the court of appeals did not accord it. (FR 42-43, NS 38-39, CSXT 28-29.) The court of appeals held that this Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) did not require it to defer to the Commission's interpretation of section 11341(a) as authorizing that agency to exempt carriers from collective bargaining agreement obligations because that court's examination of the language and legislative history of section 11341(a) indicated Congress did not

[37] *Schwabacher v. United States*, 334 U.S. 182, 200-01 (1948); *Seaboard Air Line R. v. Daniel*, 333 U.S. 118, 121 (1948); *Texas v. United States*, 292 U.S. 522, 531-532 (1934). In 1952, the ICC held these cases not applicable to private contracts. *Gulf, Mobile & Ohio R.R. Co.—Abandonment*, 282 I.C.C. 311, 335 (1952).

extend exemption authority to collective bargaining agreements. (Pet. App. 11a-19a.)

Union Respondents respectfully submit that the court of appeals was correct in its reading of the statute and congressional intent for the reasons relied upon by that court. Moreover, when section 11341(a) is read in conjunction with the plain language of section 11347, as Union Respondents submit it must be read, the validity of the lower court's judgment is confirmed.

In the instant cases, the Commission has now conceded that its "assertion of this power [over employee statutory and contract rights] is fairly recent" (remand decision, 755) and, as the court correctly noted (Pet. App. 23a), the ICC made no attempt to justify its assertion of that power at this time when it had consistently and historically refused to claim such power in the past (remand decision, 755).

In addition, since 1983, the Commission has been less than a model of consistency on the subject of its section 11341(a) authority over labor-management relations. For fifty years prior to its *DRGW* decision, the ICC disavowed expertise in labor matters. *See, infra*, 32-33. In *DRGW*, it held it could modify employee rights under contracts if the modifications (crew assignments in a trackage rights agreement) were a part of the contract it approved. Two years later it held its orders, and not labor contracts or the RLA, govern labor relations. *Maine Central, supra.* In the instant cases, prior to the court of appeals decision, the ICC's primary claim of authority to override employee rights was grounded in section 11341(a), but immediately after that court's decision, it agreed with the validity of the court's ruling, disavowed ever having relied on section 11341(a) and placed its full reliance on section 11347 as the source of its authority. *Brandywine, supra* 11. Following this Court's grant of the petitions of CSTX and NS, the Commission returned to its earlier position that section 11341(a) provided the exemption authority to modify or eliminate employee contract rights. (FR 22, *et seq.*) Recently,



the Commission extended the reach of its governance of employee contract rights to the interpretation of collective bargaining agreements.[38] But, on October 5, 1990, the Commission issued a decision in a non-labor setting approving an assignment of trackage rights to the Delaware & Hudson Railway, but refused to decide whether the assignability of those rights was prohibited by other contracts between the parties. The Commission refused to rule on that issue stating: "The Commission normally avoids interjecting itself into contract disputes [citation omitted]". *Canadian Pacific Limited, Et Al.—Purchase and Trackage Rights—Delaware & Hudson Railway Company*, 7 I.C.C.2d 95, 119 (1990).

For these reasons, Union Respondents respectfully submit that the ICC decisions in the instant cases are not entitled to the deference which would normally be accorded them.

## II. SECTION 11341(a) DOES NOT AUTHORIZE THE COMMISSION TO OVERRIDE COLLECTIVE BARGAINING AGREEMENTS

Petitioners and Federal Respondents argue that the court of appeals erred in failing to conclude that a party, after entering into a merger or control approved by the Commission, is exempt from any legal obligations imposed by a collective bargaining agreement as well as from the assertion of rights derived from the Railway Labor Act which might impede the carrying out of any future action in implementation of that merger or control. (FR 22, *et seq.*; CSXT 21, *et seq.*; NS 16, *et seq.*) Union Respondents respectfully submit that the Petitioners' and Federal Respondents' view of section 11341(a) is without merit for

---

[38] *Ogeechee Railway Co.—Purchase and Trackage Rights—Missouri Pacific Railroad Company, Etc.*, Finance Docket Nos. 31570 and 31571 (July 27, 1990); *Rio Grande Industries, Inc., Et. Al.—Purchase and Related Trackage Rights—Soo Line Railroad Company, Etc.*, 6 I.C.C.2d 854, 894 (July 16, 1990). *See also, Wilmington Terminal Railroad, Inc.—Purchase and Lease—CSX Transportation, Inc. Lines Between Savanna and Rhine, Etc.*, 6 I.C.C.2d 799, 817 (June 20, 1990).

their reading of that provision impermissibly expands the range of carrier actions within its scope and injects the ICC directly into the labor relations of the railroad industry.

### A. The Plain Language Of Section 11341(a) And Its History Do Not Support Its Use As A Basis For ICC Labor Relations Authority

It is axiomatic that the "starting point" in any case involving the interpretation of a federal statute is the "language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Where that language is clear, the inquiry into its meaning should cease, for Congress is presumed to have intended what the plain language of its statutes states. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980). Moreover, since section 11341(a) is in effect an implied repeal statute, it must not be expanded beyond its literal terms—*i.e.*, it must be construed narrowly. *E.g., Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 421 (1986); *accord, Watt v. Alaska*, 451 U.S. 259, 267 (1981). When those principles are applied to section 11341(a), it becomes clear that this immunity provision is not as expansive as Federal Respondents and Petitioners now believe. Moreover, Union Respondents respectfully submit, the Interstate Commerce Act itself, prior decisions by this Court, past ICC practice, the provision's legislative history and, the recent remand decision of the ICC, all demonstrate that section 11341(a)'s exemption authority does not extend to collective bargaining agreements.[39]

While section 11341(a) provides that the ICC's "authority . . . under this subchapter [*i.e.*, Subchapter III of Chapter 113] is exclusive", it is apparent that this exclusive authority extends only to matters over which

[39] Indeed, NS, in its question presented and its argument (NS 16-23), contends section 11341(a) relieves railroads of *all* contracts that impede its carrying out an approved merger.



Congress has given the ICC jurisdiction under the ICA's consolidation procedures.

Section 11343(a) of the ICA, 49 U.S.C. § 11343(a), lists certain railroad transactions that may be undertaken only with the approval and authorization of the Commission. Among those transactions is the consolidation or merger of two or more carriers "into one corporation for the ownership, management and operation of the previously separately owned properties" (section 11343(a)(1)); the "acquisition of control of at least 2 carriers by a person that is not a carrier" (section 11343(a)(4)); and, the "acquisition of control of a carrier by a person that is not a carrier but controls any number of carriers" (section 11343(a)(5)). Section 11341(a)[40] confers exclusive authority upon the Commission only in matters arising under subchapter III of Chapter 113 and exempts carriers participating in an approved transaction "from the operation . . . of all other . . . law, . . . . as may be necessary to enable them to carry into effect the transaction so approved or provided for an accordance with the terms and conditions, if any, imposed by the Commission."[41] When the successful railroad applicants become

[40] Section 11341(a) was first enacted as Section 5(8) of the Interstate Commerce Act by Section 407 of the Transportation Act of 1920, 41 Stat. 456, 482. Section 11341(a)'s current wording is the result of the codification of the Interstate Commerce Act which was effected by the Recodification Act of 1978. Pub. L. No. 95-473, 92 Stat. 1337 (1978), which effected no substantive change. *See infra*, n.41.

[41] The language quoted is from section 11341(a) as it appeared in section 5(12) of the Act before recodification. Section 3(a) of the 1978 Recodification Act provides that the restatement of the ICA was made without substantive change and "may not be construed as making a substantive change in the laws replaced." 92 Stat. 1466. According to the recodifiers, the phrase "carry into effect" was changed to "carry out" for clarity and the clause "in accordance with the terms and conditions, if any, imposed by the Commission" was omitted "as unnecessary" because of the restatement. House Report No. 95-1395, 95th Cong., 2d Sess. at 159 (1978); Pub. L. No. 95-473, 92 Stat. 1337, 1434. The authors of the recodification viewed as obvious the statutory requirement that any

one corporation or become the subsidiaries of a parent corporation, they have fully effected the authority which the plain language of subchapter III authorizes the ICC to confer. Section 11347 requires the ICC to protect employees from the results of approved "transactions" when they occur, but there is nothing in the law or its history which would permit the ICC to extend its limited and specified approval authority to *results* of transactions, particularly where such an extension would inject it into labor relations.

In the sixty-three years that passed between the initial enactment of section 11341(a) and the Commission's decision in the *DRGW* case, neither the Commission nor the courts believed that the ICC had any jurisdiction over labor relations matters, much less could override the statutory or agreement rights of employees on the basis of authority conferred by that provision.[42]

One of the first to express an authoritative opinion on ICC jurisdiction over labor relations was Joseph B. Eastman, Federal Coordinator of Transportation and Chairman of the ICC. In 1934, Congress was considering amendments to the Railway Labor Act. Section 2 of a pending bill related to the railroads' collective bargaining duties and contained a provision requiring any U.S. Attorney to prosecute violations of its provisions upon the application of the employees' union representative. Representative Holmes suggested deleting the union as an applicant to seek prosecution and to give that responsibility to the ICC. Mr. Eastman responded:

---

permissive Commission order had to be carried into effect in accordance with its conditions. Section 11341(a) in its precodified form as section 5(12) is set forth in Appendix E to this brief.

[42] Federal Respondents and Petitioners rely upon only two decisions from that long history. *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir. 1963), *aff'g* 202 F.Supp. 277 (S.D. Iowa 1962), *cert. denied*, 375 U.S. 819 (1963) and *Norfolk & Western Ry. and New York & St. Louis R.R.—Merger, Etc.*, 347 I.C.C. 506, 511-512 (1974). These cases involved the application of agreements, not their modification or elimination. They are discussed *infra*, 41-42.



> It certainly should not be the Interstate Commerce Commission, because they have no jurisdiction over labor matters at all and never have had.

*Hearings on H.R. 7650 Before the House Committee on Interstate and Foreign Commerce*, 73rd Cong., 2d Sess. at 54 (1934).

Between 1959 and 1970, many railroad merger and control cases were approved by the Commission in which the unions and managements involved agreed to guarantees of lifetime employment in return for a management right to transfer work and employees throughout the merged system. *See supra*, 13 n.26. Surely, had the railroads thought that section 11341(a) exempted them from the transfer restrictions in their existing agreements they would not have guaranteed their employees lifetime employment to obtain that relief.

After the collapse of the Penn Central and other Northeast railroads, Congress enacted the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 986 ("3R Act"), to preserve that rail service. Penn Central had agreed to life-time protection for their employees as had other merging railroads and for the same reasons. During the course of the hearings on the 3R Act, representatives of labor and the managements of other railroads who had formed a committee to negotiate and submit to Congress for its consideration a statutory provision to replace the Penn Central attrition agreement, testified before the Senate Committee on Commerce. The labor witness testified that in reaching agreement with the railroads on this proposed statutory provision, which became section 503 of the 3R Act,[43] labor wished to provide the corporation to be created [now Conrail] "the widest possible latitude . . . in getting . . . underway" by placing in the statute "unprecedented provisions for transfer of employees and work as between all these various preexisting [railroad] corporations".

---

[43] Section 503 of the 3R Act (45 U.S.C. § 773 (repealed)) is set forth as Appendix F to this brief.

*Hearings before the Surface Transportation Subcommittee of the Committee on Commerce, U.S. Senate, on S.2188 and H.R. 9142*, 93rd Cong., 1st Sess. at 952-53 (1973). Mr. Graham Claytor, then president of Southern and a management witness, when questioned as to the reason for such expensive protection being accorded employees by the proposed statutory provision,[44] testified that in returr for that protection, the railroads involved had been given "the right to trasfer [sic] people within their craft outside of their seniority district"; that "this is terribly important as a practical matter . . . . [w]ork can be transferred freely . . . you may close a shop here and concentrate all the work in another shop there." Mr. Claytor further stated that the freedoms to transfer work and employees "were the principal items that we [the railroads] . . . felt, principal reasons that we felt this agreement made . . . this new corporation [Conrail] a viable thing . . . ." (*Id.* at 972-73.)

Union Respondents respectfully submit that had Mr. Claytor and the other railroads' representatives thought that the Congress had already provided such relief to railroads going before the ICC to obtain merger approval, they would have sought the same relief from Congress for Conrail instead of guaranteeing lifetime protection for Conrail's future employees.

The only attempt at direct use of section 11341(a) to override the statutory and contract rights of employees was made in 1958 by the Chicago and North Western Railway Company ("C&NW") in circumstances remarkably similar to those now before the Court.

The C&NW had leased all lines of the St. Paul, Minneapolis and Omaha Railway Company ("Omaha") as the result of an ICC order. C&NW returned to the ICC complaining that it had tried and failed to obtain agreements with certain of the unions involved which were required before it could carry out the integration of the

[44] The provision became section 505 of the 3R Act, 87 Stat. 1014.



C&NW and Omaha properties under the lease. C&NW asked the ICC to declare (295 I.C.C. 696-697):

> that, in consequence of the exclusive and plenary authority vested in this Commission with respect to the unification of railway carriers, section 6, and related provisions, of the Railway Labor Act are inapplicable and that, in order to enable the parties to carry out the transaction authorized and contemplated by our [I.C.C.] order of December 28, 1956 the parties to this proceeding are expressly relieved of the restraints, limitations and prohibitions of all other laws, including expressly section 6 of the Railway Labor Act; . . .

The Commission held it had no authority to grant C&NW's request because its order approving the lease was permissive as to the carriers and no requirement was made of the employees (*id.* 701); section 5(2)(f) [now § 11347] required certain duties be imposed upon the carriers and did not authorize the ICC to direct the employees or the unions to do anything (*id.*); and, section 5(11) [now section 11341(a)] was self-executing and did not authorize the ICC to declare particular laws superceded by its orders (*id.* 702).[45] Most significantly for the purposes of the history of the application of section 11341(a) are the final two grounds upon which the ICC rejected C&NW's request (*id.*):

> Congress has not conferred upon us the power to determine the disputes which are subject to the Railway Labor Act or questions regarding the jurisdiction of the National Mediation Board, which, in effect, is what North Western requests us to do.
>
> It is apparent that the Railway Labor Act has not prevented the North Western from effectuating the transaction authorized by the prior order. That order authorized the lease of North Western of the line of railroad and other properties owned, used, or operated by the Omaha, and this has been accom-

[45] The court of appeals disagreed with the latter part of this particular holding in the Commission's *Omaha* decision. (Pet. App. 21a.)

plished. The order did not provide any particular method for integration of the physical operations involved, and, except for the imposition of the above-mentioned conditions for the protection of employees, did not deal with employer-employee relationships.

The next case in which the Commission stated its views on ICC authority over labor relations was *Southern Ry. Co.—Control—Central of Ga. Ry. Co.*, 331 I.C.C. 151 (1967). The Commission had approved the control of the Central of Georgia Railway ("Central") by Southern through a stock purchase in 1962.[46] In imposing the conditions for the protection of employees, the ICC had unintentionally omitted protections requiring a 90-day notice of intended changes affecting employees and the negotiation of implementing agreements.[47] The Southern proceeded to abolish over 1500 jobs of Central employees and transferred their work to Southern (331 I.C.C. 171). The Central employees received no recognition of their contract or RLA rights. In 1964, this Court vacated the judgment entered against the unions by a 3-judge district court and remanded the case to that court with instructions that it be remanded to the ICC and that agency ordered to amend its reports and orders "as necessary to deal with [union] appellants' requests that §§ 4, 5 and 9 be included as protective conditions . . . ."[48]

After extended hearings on remand in which it received testimony from the affected employees, the Commission noted that the railroads made no "attempt to negotiate with the railroad organizations of the two railroads for an agreement authorizing the transfer of work from one railroad to the other in effectuating the consolidations" (331 I.C.C. 171) and concluded that the railroads demonstrated "a callous disregard . . . for the es-

[46] *Southern Ry. Co.—Control—Central of Ga. Ry. Co.*, 317 I.C.C. 557 (1962).

[47] Protections similar to those in *New York Dock* conditions, Art. I, Sec. 4.

[48] *Railway Labor Executives' Ass'n v. United States*, 379 U.S. 199 (1964).



tablished rights and interests of the employees on the Central of Georgia. . . ." (*Id.* 185.)

In the course of its opinion, the ICC set forth its duty and limitations under the law. These statements require no elaboration (*id.* 169-170) (emphasis in original):

> [W]e impose formulae of protective conditions *upon the carriers* seeking specific permissive authority under section 5(2) [now sections 11343, 11344] of the act, the purpose being *to protect* the interests of employees, some of which in a particular case may well have been established under bargaining agreements executed pursuant to the Railway Labor Act.
>
> • • • •
>
> The rights of railroad employees under their collective bargaining agreements, under the Washington Agreement, and under the protective conditions imposed upon the carriers under section 5(2)(f) are independent, separate, and distinct rights. We have historically recognized the independent nature of those rights and have distinguished the employee rights derived from collective bargaining agreements from those derived from conditions which we have imposed upon carriers. The rights under the former are based upon private contracts; those under the latter stem from our statutory duty to protect employees.
>
> • • • •
>
> These protective conditions imposed upon carriers under section 5(2)(f) [now 11347] which provide affected employees compensatory protections for wages, fringe benefits and other losses are designed to apply after the carriers have arrived at their adjustments of the labor forces *in accordance* with the governing provisions of their collective bargaining agreements so that the carriers may be enabled to carry an approved transaction into effect. *Texas & N.O.R. Co. v. Brotherhood of Railroad Trainmen*, (5th Cir., 1962) 307 F.2d 151.

Of equal importance, this contention of applicants is demonstrably erroneous. By its terms, section 5(11) applies only to antitrust and other restraints

> of law from carrying "into effect the transaction so approved . . .". Neither the Washington Agreement nor the specific collective bargaining agreements between these roads and their employees is such a restraint, for indeed *section 5 transactions have been successfully consummated in full compliance with such terms. Cf., Chicago, St. P., M. & O., Ry. Co., Lease*, 295 I.C.C. 696. . . . [Emphasis supplied.]

The Southern and Central did not appeal from this decision.

Union Respondents respectfully submit that prior to the Commission's decisions in *DRGW*, *Maine Central* and their progeny, there is no support to be found for the notion that anyone believed that section 11341(a) could be interpreted to override the contract rights of employees.

**B. The Commission Has No Expertise In Labor Relations**

The Commission has repeatedly disavowed any expertise in labor relations. Coordinator Eastman was emphatic in rejecting ICC entry into that arena. *See supra*, 27. The language of sections 11343 and 11341(a) contain no implication that they are intended to involve the ICC in labor relations.

In 1977, the Commission expounded at some length on its lack of expertise in labor relations. *Leavens, et al. v. Burlington Northern, Inc.*, 348 I.C.C. 962, 975, 976 (1977). Even as recently as January 26, 1983,[49] in a case in which a union wanted the ICC to declare a railroad in violation of the Commission-imposed employee protective conditions, the Commission refused, reaffirming its lack of "expertise to place ourselves into the field of collective bargaining for labor management relations." *Brotherhood of Locomotive Engineers v. Chicago and North Western Transportation Company, et al.*, 366 I.C.C. 875, 861 (1983). Also in 1977, the Commission rejected a request from another union to remove a pro-

[49] The *DRGW* case was decided ten months later (October 19, 1983).



vision in a trackage rights agreement the ICC had approved which specified the crews which would operate the trains over the leased tracks. The Commission held "'hat as to . . . matters relating to labor relations as may fall within the purview of the Railway Labor Act the [ICC Review Board correctly] declined jurisdiction over such questions." *Illinois Central Gulf R. Co.—Trackage Rights—Chicago and Ill. Midland Ry.*, Finance Docket No. 28046 (February 22, 1977) (not printed).

While an administrative agency may change its mind regarding the interpretation of the statute it administers so long as it specifies its reasons for doing so, it does not, we respectfully submit, by so changing its mind suddenly acquire an expertise which it had always recognized it did not have.

**C. Congress Has Avoided Allowing The ICC Involvement In Labor Matters**

Except for its commands requiring the ICC to consider employee interests as part of the public interest and to provide employees with specific minimum protections, the Congress has not given the ICC the right to involve itself in employment matters, least of all labor relations.

Certainly, section 11341(a) cannot be read as a labor relations statute; nor can section 11347, which is a minimum standards type of legislation. *Compare, Fort Halifax Packing Co.*, 482 U.S. 1, 20-22 (1987) *with Terminal R.R. Assoc. v. Brotherhood of R.R. Trainmen*, 318 U.S. 1, 6 (1943). It would be incongruous to conclude that having enacted the Railway Labor Act to govern labor relations procedures in the railroad industry and having often refused to require compulsory arbitration of major disputes in that industry,[50] Congress would require compulsory arbitration of major disputes by implication under the jurisdiction of an agency that has repeatedly held itself out as having no expertise in labor

[50] Section 7 First of the RLA, 45 U.S.C. § 157 First, prohibits compulsory arbitration of major disputes.

relations. It is simply wrong to read section 11347, a minimum standards provision designed to *protect* employee interests, as effecting *sub silentio* such a major change in rail labor relations—*i.e.*, the implied repeal of Section 7 First of the RLA.

Other than the provisions which require protection of the interests of employees who might be affected by ICC orders, the Interstate Commerce Act refers to employees in only two other respects: in section 11344 the "interest of carrier employees affected" is listed as one of the elements of the public interest which the Commission must consider in passing upon one or more of the transactions listed in section 11343(a) and, in section 10101 (a), encouragement of "fair wages and safe and suitable working conditions in the railroad industry" is listed as one of fifteen stated objectives of the United States in regulating the railroad industry.[51] Neither of these provisions gives to the ICC any authority over labor relations.

The Congress, however, has allowed the Commission to affect labor relations in a tangential and most limited way in two provisions contained, not in the Interstate Commerce Act but, in the Railway Labor Act. In section 1 First of the RLA, 45 U.S.C. § 151 First, the ICC, upon request of the National Mediation Board or upon complaint of an interested party, is to determine whether an electric powered railroad is a "carrier" within the meaning of that term as defined in section 1 First; and, in order to determine who would be considered an "employee" or "subordinate official" and thereby subject to the RLA, the Congress authorized the ICC to make that determination based upon the type of work performed by the person involved. However, in providing that authority in section 1 Fifth (45 U.S.C. § 151 Fifth), Congress very carefully circumscribed the ICC's role:

> *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

[51] *See, United States v. Lowden*, 308 U.S. 225, 332-38 (1939).



Those are the only statutory provisions in the U.S. Code which could be viewed as allowing the Commission to have even the most peripheral effect on railroad labor relations.

The legislative history of the rail consolidation provisions of the Interstate Commerce Act also demonstrates Congress' refusal to extend to the ICC jurisdiction over labor relations matters. Railroads have been subject to federal regulation as an industry for over 100 years (*see*, Act of February 4, 1887, 24 Stat. 379), and during virtually that same period, Congress has also regulated rail labor relations. *E.g.*, Arbitration Act of 1888, 25 Stat. 501. Rail regulation by the ICC became more extensive after the railroads were returned to private ownership by the Transportation Act of 1920, 41 Stat. 456, but Congress has never given the ICC control over labor relations matters, even though such control has been proposed on several occasions. *E.g.*, Testimony of Federal Coordinator Eastman, *supra*; S. Rpt. No. 459, 88th Cong., 1st Sess. at 9 (1963) to accompany S.J. Res. 102, Pub. L. 88-108; 77 Stat. 129.[52]

Although Congress has long recognized that stable labor relations are essential to an efficient national rail transportation system and that there is an overlap between this goal and sound financial regulation by the ICC (*e.g., United States v. Lowden*, 308 U.S. 225, 235-36

[52] In that report, the Senate, and later the Congress, rejected the use of the ICC as the body to investigate and report on a long-time "crew consist" dispute, involving the continued use of firemen on locomotives, by stating (S. Rpt. No. 459 at 9): "[N]either the Interstate Commerce Commission or the other regulatory agencies other than the National Labor Relations Board, which are, in fact, arms of Congress, are designed or intended to serve as a repository for labor disputes. This Committee has no desire to see a change made in this respect."

(1939)), Congress has nevertheless treated the two forms of regulation separately. For example, while Title IV of the Transportation Act of 1920 made extensive amendments to the Interstate Commerce Act, including adding for the first time the predecessor of what is now Section 11341(a), Title III of that Act created the Labor Board to investigate and to report on rail labor disputes; it provided for voluntary adjustment boards to consider minor disputes; and, it required both rail labor and management to exert every reasonable effort to avoid any interruption to the operation of any carrier. 41 Stat. at 469. There is no indication in the Transportation Act of 1920 that Congress also intended to give the ICC any jurisdiction over labor relations matters to the exclusion of the Labor Board or adjustment boards, when it first enacted in Title IV of that Act what is now Section 11341(a). Indeed, by placing the two forms of regulation in separate titles, it must be presumed that the ICC's exclusive authority over consolidations did not include jurisdiction over labor relations matters.

The discrete nature of the two forms of regulation is borne out by the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, ("ERTA"). Congress reenacted in Section 202 of that Act what is now Section 11341(a) as part of its grant of jurisdiction to the ICC over railroad consolidations. *See, Texas v. United States*, 292 U.S. 522, 534-35 (1934). That Act also created the office of the Federal Coordinator of Transportation who was given the specific authority "to encourage and promote or *require* action" on the part of railroads to "avoid unnecessary duplication of services and facilities . . . [and] avoid other wastes and preventable expense . . . ." Section 4 of ERTA, 48 Stat. at 212 (emphasis added). Congress also gave orders of the Coordinator an immunity similar to that it had reenacted for ICC consolidation orders, but, because his orders were mandatory, it specifically limited that immunity in several respects. First, laws "for the protection of the public health or safety" were not to be waived; and, as relevant here: "[N]oth-



ing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act." Section 10(a), ERTA, 48 Stat. at 215; *see also*, Section 10(b), 48 Stat. at 215.

The Federal Respondents and the Petitioners rely heavily upon the 1936 expiration of Title I of the Emergency Transportation Act of 1933 which contained a provision similar to section 11341(a), but with the specific prohibition against the elimination or modification of employees' RLA and contract rights in any order of the Federal Railroad Coordinator compelling specific economies to be undertaken by railroads. (FR, 32-33; NS, 27-29; CSXT, 39-43.) They argue that because Congress permitted Title I to expire and did not amend the section 11341(a)-type provision in Title II to include the specific prohibition against elimination or modification of employees' rights, Congress intended to include the statutory and contract rights of employees within the exemptive authority conferred by section 11341(a). (*Id.*)

Reliance on such an argument is misplaced for it fails to take into account the broader jurisdiction which the Coordinator had, as compared with that given to the ICC. As this Court has stated before:

> From the initial enactment in the Transportation Act of 1920 . . ., to the most recent comprehensive reexamination of these provisions in the Transportation Act of 1940 . . ., Congress has consistently and insistently denied the Interstate Commerce Commission the power to take the initiative in getting one railroad to turn over its properties to another railroad . . . . The role of the Commission in this regard has traditionally been confined to approving or disapproving mergers proposed by the railroads to be merged.

*St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298, 305 (1954). Moreover, in passing on the validity of a consolidation transaction proposed by the railroads, the

Commission's jurisdiction is limited to the financial transactions specified in Section 11343(a). The Coordinator's jurisdiction, however, ran to all matters which could permit railroads to operate more economically and he had explicit authority to *require* carriers to take certain actions.

Congress recognized that the Coordinator's broader jurisdiction could cover labor relations matters and it provided certain protections for employees, including advance notice of orders which will affect the interests of employees (Section 7(a)); a prohibition on reductions in numbers of jobs by reason of any action taken pursuant to the authority of the Coordinator (Section 7(b)); a guarantee against individual employees being deprived of employment or placed in a worse position with respect to compensation by reason of any action taken pursuant to authority of the Coordinator (*id.*), and, a specific recognition that the Coordinator's orders did not supersede the Railway Labor Act (Section 10(a)). A comparable limitation on the scope of what is now Section 11341(a)'s immunity as not affecting Railway Labor Act rights was not necessary for the simple reason that Congress in the separate Title devoted to the ICC, had not even arguably given the ICC jurisdiction over labor relations matters.

Moreover, section 11341(a) and its predecessors were never utilized by the Commission to override the statutory and contractual rights of employees until the Commission issued its decisions in *DRGW* and *Maine Central*, *supra*.[53] And, even assuming that there was some ambiguity in the reach of Section 11341(a) prior to 1976, that ambiguity was eliminated when Congress amended section 11347[54] (then section 5(2)(f)) to direct the Commission

[53] The four attempts to do so prior to the Commission's 1983 *DRGW* decision were rejected. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.—Lease*, *supra*, 295 I.C.C. 696 (1958); the three arbitration decisions referred to by the ICC in its remand decision at 6 I.C.C.2d 746 were not appealed by the railroad involved (N&W) to the Commission or the courts.

[54] 4R Act, Section 402(a), 90 Stat. 31, 62.



to condition its orders of approval upon terms requiring the carriers to preserve all existing statutory and contract rights of the employees involved should they decide to carry out the permissive authority granted. *See*, *infra*, 45-47.

Petitioners and Federal Respondents (FR 35-38; NS 29-33; CSXT 43-46) refer to the passage of what was then section 5(2)(f) during Congress' consideration of the Transportation Act of 1940 and argue that Congress' "rejection" of the Harrington Amendment[55] shows that Congress intended to allow carriers to implement consolidations irrespective of the fact that the ICC's approval might result in the unilateral alteration of working conditions "as long as those employees were compensated and otherwise fairly protected under the Commission's labor protective conditions." (FR 38.) Those assertions are without merit for the Transportation Act of 1940 required the ICC to consider as part of its public interest determination the impact of the proposed transaction on employees and to impose a fair and equitable arrangement "*to protect* the interests of the railroad employees affected" by the transaction. Section 7 of the Transportation Act of 1940, 54 Stat. 899, 906-07, adding 49 U.S.C. § 5(2)(b) (emphasis added). It did not authorize or intend the abrogation of employee rights.

The concept of protecting employee interests was not new in 1940, for the Commission had recognized since 1934 that the impact of a transaction on employees was

[55] Representative Harrington proposed that the Commission could not approve a transaction "if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees." 84 Cong. Rec. 9882 (1939). Rep. Harrington's original amendment was not "rejected", but was eventually modified and incorporated as the second sentence of section 5(2)(f) which required that the protective arrangement to be imposed must provide at the minimum that affected employees receive at least a four year guarantee against being placed in a worse position with respect to compensation. *See*, *Brotherhood of Maintenance of Way Employes v. United States*, 366 U.S. 169, 174 (1961).

an integral part of the public interest to be considered in deciding whether to approve a transaction (*St. Paul Bridge & Terminal Ry.—Control*, 199 I.C.C. 588, 596 (1934)), and for several years prior to 1940, it had been imposing an arrangement to protect employee interests as a condition of its consolidation approvals. *See, United States v. Lowden, supra.* Employee interests were considered and protected, not because employee protection was the price to be paid to allow a rail carrier to change rates of pay, rules or working conditions, but rather, because Congress had determined that it was not in the public's interest for rail employees to be the primary providers of the economic benefits which consolidations could achieve for railroads. *ICC v. Railway Labor Executives' Assoc.*, 315 U.S. 373, 377-79 (1942); *United States v. Lowden, supra*, 308 U.S. at 235-36. Requiring the ICC to consider and to protect the interests of employees is far different from allowing the Commission to authorize new rates of pay, rules, or working conditions, for the former is directed to the parties seeking ICC approval of a consolidation transaction—*i.e.*, the carriers—whereas the latter requires the ICC to direct rail labor to take certain action. As the ICC has said before:

> [U]nder section 5 of the Act [now § 11341, *et seq.*] we merely authorize or permit the applicant carriers to enter into a proposed transaction. We may not even compel the carriers to consummate an authorized transaction. . . .
>
> Under section 5(2)(f) of the Act, we are "required" to impose upon the carriers in each approved transaction conditions for the protection of railroad employees affected. But this section only authorizes the imposition of duties upon the carrier. It does not authorize us to direct the employees or organizations of employees to do anything . . . .

*Chicago, St. Paul, Minneapolis & Omaha Ry.-Lease, supra*, 295 I.C.C. at 701. Congress, Union Respondents respectfully submit, intended labor relations matters arising from a consolidation to be resolved by the procedures of the Railway Labor Act. *See generally, Air Line Pilots*



*Assoc. v. CAB*, 667 F.2d 181 (D.C. Cir. 1981); *Delta Air Lines, Inc. v. CAB*, 543 F.2d 247, 260 (D.C. Cir 1976) (Civil Aeronautics Board's jurisdiction over airlines does not extend to safety matters which are subject to jurisdiction of Federal Aviation Administration).

Union Respondents' position that the ICC does not have jurisdiction over labor relations matters is supported by the ICC's treatment of the supposed conflict between the Interstate Commerce Act and the Railway Labor Act prior to 1983. *See, supra*, 27-32. Union Respondents' position as to the limited nature of the ICC's exclusive jurisdiction under Section 11341(a) is supported by the Fifth Circuit's decision in *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen, supra*, in which the railroads sought to enjoin a strike by rail labor over the carriers' refusal to negotiate under the Railway Labor Act changes in working conditions resulting from an ICC approved consolidation transaction. 307 F.2d at 158. As the Fifth Circuit observed, the railroads included in their application to the ICC "such detail . . . as to determine the major provisions of a new labor contract [to govern the new operations], although at no time were the unions brought into the negotiation of these agreements." *Id.*:

> The appellants then argue that ICC approval of the agreements makes them binding on the unions. If so, not only does section 5 give the Commission power to approve a section 5(2) transaction, but it gives the carriers the right to legislate the terms of a continuing contract with a third party, although a different contract more favorable to the third party might have been equally acceptable to the Commission. We do not feel the statute may be so interpreted.

A contrary result was reached at about the same time in *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963) upon which Petitioners and Federal Respondents rely. But the fact that the *BLE* case would create a conflict between the ICA and the RLA schemes of regulation and the *T&NO* case accommodates those schemes without conflict; and, the fact that

in *BLE* there was no conflict for the union was bound by a voluntary agreement to arbitrate, substantially lessen *BLE*'s value to Petitioners and Federal Respondents.

The only pre-1983 statement of the ICC relied upon by Petitioners and Federal Respondents is *Norfolk & W. Ry. Merger*, 347 I.C.C. 506, 511-12 (1974), in which the Erie-Lackawanna Railroad had been included in the N&W merger and had signed an employee protection agreement which its court-appointed Trustee wished to have rescinded. Labor argued, *inter alia*, that the ICC had no authority to rescind the agreement. The ICC said in the course of its opinion that it could do so under section 5(11), but it did not and required the Trustee to abide by the agreement. The decision was not appealed.[56]

In the 102 years that Congress has regulated rail labor relations, it has refused to compel the arbitration of major disputes, except in a few special cases where the bargaining process had been exhausted without agreement. *E.g.*, *supra*, n.52. Indeed, Section 7 First of the Railway Labor Act, 45 U.S.C. § 157 First provides: "That the failure or refusal of either party to submit a controversy [over rates of pay, rules, or working conditions] to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act *or otherwise*." (Emphasis added.) Also, Congress has concluded that in order to encourage compromise, neither rail management nor labor can change the status quo during the negotiation and mediation phases of the compulsory bargaining. 45 U.S.C. §§ 152, Seventh, 155 First and 156. This Court has held those status quo requirements to be central to the design of this labor statute. *Detroit & Toledo Shore Line R. v. UTU*, 396 U.S. 142, 150 (1969). As this Court has explained:

> The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned, these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce . . . .

*Terminal Railroad Assoc. v. Brotherhood of Railroad Trainmen*, *supra* at 6 (1943) (footnote omitted).

Whether judged by Section 11341(a) or by general conflict of laws principles, it is clear that the ICC has no authority in labor matters and that separate schemes in regulating railroad transportation under the Interstate Commerce Act and the Railway Labor Act do not conflict, for the goals of both Acts are compatible.[57] As this Court has stated before, repeals by implications "are not favored" (*e.g.*, *Morton v. Mancari*, 417 U.S. 535, 549 (1974)) and will not be found to exist unless the intention of the legislature to repeal is clear and manifest. *Watt v. Alaska*, *supra*, 451 U.S. at 267. Indeed, federal courts "must read the statutes to give effect to each if we can do so while preserving their sense and purpose." *Id.* Here, Federal Respondents and Petitioners have made no attempt to read the Interstate Commerce Act's consolidation provisions together with the commands of the Railway Labor Act, but the fact that

---

[56] Neither *BLE* nor *N&W Merger* overrode contracts and prior to 1983, neither case had been relied upon by the ICC to support an order overriding a contract.

[57] Congress' refusal to vest the ICC with labor relations authority renders *Schwabacher v. United States*, *supra* inapposite here because *Schwabacher* held state law was pre-empted where Congress had given the ICC "complete" control of the subject matter. There, the ICC had "complete control of the capital structures to result from a merger," 334 U.S. at 191-92, 195, by virtue of 49 U.S.C. §§ 11301 and 11343. Neither those nor any ICA provision give ICC control over labor matters.

the two Acts have existed side-by-side without a conflict for more than fifty years prior to the Commission's 1983 shift in its policy toward employee rights, as acknowledged by ICC (*supra*, 12) demonstrates that the two Acts can be read so as to give effect to each.

Imposed arbitrated changes, such as those which occurred in the arbitration awards in these cases, are contrary to the Railway Labor Act. More important, they have brought with them, as recognized by the ICC, *supra*, 12, a deterioration of labor-management relations; a "loss of employee morale when the demands of justice are ignored." *United States v. Lowden, supra*, 308 U.S. at 236. These results are contrary to the goals of the Interstate Commerce Act. *See, ICC v. Railway Labor Executives' Assoc., supra*, 315 U.S. at 377. As this Court has explained:

> The Commission acts in a most delicate area here [*i.e.*, a strike situation where it was asked to certify a replacement motor carrier], because whatever it does affirmatively . . . may have important consequences upon the collective bargaining processes between the union and the employer. The policies of the Interstate Commerce Act and the labor act necessarily must be accommodated, one to the other.

*Burlington Truck Lines, Inc. v. United States, supra*, 371 U.S. at 172-73. Unfortunately, by concentrating solely on the speedy implementation of all aspects of an approved transaction, no matter when they occur after the transaction itself has been consummated, and by ignoring the limits of its jurisdiction, the ICC has made no attempt to accommodate the policies of the two statutes. It has simply ruled that employee contract and statutory rights must give way to its orders because "its order and not the RLA or . . . [employee contracts] govern employee-management relations in connection with the approved transaction." *Maine Central, supra*.



### D. Section 11347, Particularly As Amended In 1976, Prohibits The ICC From Modifying Or Eliminating Employees' Contract And Statutory Rights

As demonstrated above, prior to 1983 the Commission, the railroads, the unions and the Congress considered the ICC to have no authority over the modification or elimination of the contract or statutory rights of employees. However, if such an issue had existed it would have been laid to rest by the 1976 amendments to the Act.

As this Court has recognized, the 4R Act and the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895, "aimed at reversing the rail industry's decline through deregulatory efforts, above all by streamlining procedures to effectuate economically efficient transactions." *Pittsburgh & Lake Erie Railroad Co. v. Railway Labor Executives' Association*, 491 U.S. ——, (1989), slip op. at 8. Yet, as the Congress progressively loosened the bonds of regulation on the railroads in each of these statutes, it added and *increased* protections to be afforded the railroad employees that might be affected thereby.

In its first step toward deregulation, the 4R Act, Congress increased the compensatory protections as well as the length of the protective period (from 4 to 6 years) for employees affected in consolidation cases and explicitly required the Commission to impose the same protections for railroad employees affected by consolidations as it had required the Secretary of Labor to establish for the protection of railroad and other employees affected by the Rail Passenger Service Act of 1970, 45 U.S.C. § 501, *et seq.*, in section 405(b) of that act, 45 U.S.C. § 565(b).[58] The 1976 amendment to section 11347 did not stir opposition from the railroads or the unions precisely because they recognized its plain language as a confirmation of existing law that the ICC had no juris-

[58] 4R Act, section 402(a), 90 Stat. 62. In relieving the railroads of many of the burdens associated with the abandonment of railroad lines, Congress also increased employee protection to the level of that provided them in section 402 and made that protection mandatory. 4R Act § 802, 90 Stat. 127-28 [now 49 U.S.C. 10903].

diction over the contractual and statutory rights of employees. There is virtually no legislative history of section 402(a) of the 4R Act which amended section 11347. Perhaps Congress wished to be certain no one could interpret the beginning of its deregulation of railroad obligations as lessening or affecting in any way the railroads' obligations to their employees; or, perhaps, because by that amendment Congress for the first time was expressly requiring the imposition of the notice, negotiation and arbitration provisions of WJPA, it wanted to be certain that no one could interpret that requirement as providing the ICC with authority to affect the contract or statutory rights of employees. Whatever Congress' reasons, its plain language is unmistakable in directing the Commission to ensure preservation of those rights.[59]

In effecting its completion of railroad deregulation by enacting the Staggers Rail Act, Congress did not affect the increased protections it had afforded the employees in the 4R Act, but, in those provisions in which it relieved railroads of specific ICC regulation, it inserted specific mandatory or discretionary protection for employees who might be affected by those provisions.[60]

---

[59] Neither the Federal Respondents, the ICC individually nor the Petitioners confront the equally explicit language of section 3 of the *New York Dock* conditions which prohibits deprivation of employee rights under protective agreements such as the "Orange Book". *See* Appendix D.

[60] Section 213 (49 U.S.C. § 10505) (relief from all ICA requirements and ICC regulations except (1) employee protection and (2) prohibited intermodal ownership); Section 219 (49 U.S.C. § 10706) (lessened need for rate bureaus but require section 11347 employee protection); Section 221 (49 U.S.C. § 10901) (construction of rail lines, discretionary protection equal to section 11347); Section 223 (49 U.S.C. § 11103) (reciprocal switching agreement discretionary employee protection); Section 226 (49 U.S.C. § 11123) (limitations on issuance of car service orders, required hiring of employees who had performed that work); Section 227 (11 U.S.C. § 1170) (bankruptcy courts bound by section 11347); Section 228 (liberalized merger provisions but left section 11347 untouched); Section 401 (49 U.S.C. § 10910 (sales of lines to "financially responsible" persons for "feeder line" development, required use of employees who "normally" would have performed the work); Section 402 (49 U.S.C. §§ 10903, 10904) (liberalized abandonment provisions but required section 11347 protection).



Union Respondents respectfully submit that the extreme and deliberate care demonstrated by the Congress to ensure the protection of employee interests in these statutes demonstrates an emphatic rejection by Congress of any notion that section 11341(a) could be considered as allowing the elimination of any statutory or contract rights of railroad employees; indeed, section 11341(a) exempts carriers from laws that would prevent a transaction from being carried out *as conditioned* (*see supra*, 25) and, section 11347, expressly requires any transaction subject to section 11341(a)'s provisions to be conditioned upon the preservation of employees' statutory rights.

Union Respondents respectfully submit, it is illogical to conclude that conditions required by Congress to be imposed by an ICC order could be considered as in conflict with the very order to which they are required to be attached.

## III. AN INTERPRETATION OF SECTION 11341(a) AS RELIEVING A RAIL CARRIER OF ITS OBLIGATIONS TO EMPLOYEES UNDER ITS COLLECTIVE BARGAINING AGREEMENTS, WOULD BE CONTRARY TO THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Another and more fundamental problem is presented by Petitioners' and Federal Respondents' position regarding the reach of Section 11341(a). If their view of Section 11341(a) is adopted, that statute would deprive third parties (who happen to be parties to a contract with an applicant railroad) of contractual rights without due process of law, and without just compensation, in contravention of the Due Process and Just Compensation clauses of the Fifth Amendment. U.S. CONST. amend. V. Since it is possible, as the court of appeals concluded, to read Section 11341(a) in such a manner as to avoid these

Fifth Amendment problems, this Court should not accept Petitioners' and Federal Respondents' constitutionally infirm construction of that statute. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974).

These consolidated cases, Union Respondents respectfully submit, are excellent examples of the Fifth Amendment pitfalls into which the railroads would take the ICC by their construction of Section 11341(a). Here, both the ATDA and BRC are parties to contracts with their respective railroads which provide that the work which the railroads transferred shall be performed by employees employed by those railroads and subject to those agreements. Additionally, the BRC's agreement with CSXT, the Orange Book, goes further and provides that CSXT has agreed not to transfer protected BRC employees or their work beyond the former SAL-ACL systems, and it made those commitments in exchange for the right, which it has since exercised, to transfer work and employees within the combined former SAL and ACL systems.

Both agreements confer property rights which are protected by the Fifth Amendment. *E.g., Brock v. Roadway Express, Inc.*, 481 U.S. 252, 260 (1987); *Lynch v. United States*, 292 U.S. 571, 579 (1934). While Congress may exercise its Commerce Clause powers in such a manner that contracts, which were valid when made, are no longer enforceable (*e.g., Louisville & Nashville R. v. Mottley*, 219 U.S. 467, 480 (1911)), it is also clear that Congress' Commerce Clause powers are limited by the protections afforded by the Fifth Amendment's Due Process and Just Compensation protections. *E.g., Wilson v. New*, 243 U.S. 332 (1917). In other words, Congress may make a contract unenforceable, but that action is far different from *relieving* one party of its contractual obligation to the other contracting party, as Petitioners and Federal Respondents argue has occurred here.

The Fifth Amendment's Due Process guarantees, rail labor submits, prohibits Section 11341(a) from being



used to relieve a railroad of its contractual obligations to a third party, such as its employees, which does not have an equal voice in deciding whether to accept or to reject the ICC's permissive regulatory approval.[61] Indeed, the fundamental unfairness in such a use of the ICA's regulatory scheme is self-evident here, where the carriers are attempting to use ICC approvals to override contracts years after those agreements were executed and the consideration has been accepted and utilized by the railroads.

Also, the Fifth Amendment's provision that "private property [shall not] be taken for public use without just compensation" prohibits Section 11341(a) from being interpreted so as to deprive the protected BRC employees of their Orange Book guarantees. Those guarantees were purchased by contract concessions long-ago accepted by CSXT's predecessors, and now CSXT is attempting to use Section 11341(a) to be relieved of its obligations to pay the protected employees their part of the bargain. Under such an interpretation, the ICC's order would have the effect of confiscating the protected employees' property rights. *See, United States v. Larionoff*, 431 U.S. 864, 879 (1977). Such a taking, we submit, would be without just compensation, for no "reasonable, certain and adequate provision for obtaining compensation" is provided. *Cherokee Nation v. Southern Kansas R.*, 135 U.S. 641, 659 (1890). The *New York Dock* conditions, may protect an employee's compensation but, because they are premised on the assumption that contract rights will be preserved, do not compensate employees for lost *contract* rights. Moreover, the *New York Dock* conditions contain no protections from loss of Orange Book prohibitions against transfer of work and employees.

---

[61] *See, Regents of The University System of Georgia v. Carroll*, 338 U.S. 586, 600 (1950) "The [FCC] . . . may impose on an applicant [for a license renewal] conditions which it must meet before it will be granted a license, but the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant."

Petitioners' and Federal Respondents' construction of Section 11341(a), would have far reaching, and, we submit, unconstitutional implications, because, as NS acknowledges (NS 21-22 n.24), no contract between an applicant railroad or motor carrier and a third party, such as a bank, a supplier, or union, would be free from the possibility of being abrogated if the applicant subsequently were to conclude that it could operate more efficiently without complying with that contract. *See*, R. A. Allen, *Railroad Line Sales*, 57 Transp. Pract. J. 255, 278-79 (1990). The ICA, including Section 11341(a), has never been read before to have such a destructive effect on contractual obligations (*e.g.*, *Central New England Ry. v. Boston & Albany R.*, 279 U.S. 415, 419 (1929) (construing what is now § 10903)), and no reason has been shown, we submit, why it should suddenly have such an effect seventy years after Congress first regulated rail mergers and consolidations.

## CONCLUSION

For the reasons set forth herein, Union Respondents respectfully submit that the judgment below should be affirmed.

Respectfully submitted,

WILLIAM G. MAHONEY
(Counsel of Record)
JOHN O'B. CLARKE, JR.
HIGHSAW, MAHONEY & CLARKE, P.C.
1050 17th Street, N.W.
Suite 210
Washington, D.C. 20036
(202) 296-8500
*Attorneys for Union Respondents*

Date: November 9, 1990

# APPENDICES

# APPENDIX A

## Statutes And Constitutional Provision Relied Upon

I. Fifth Amendment to the Constitution of the United States

II. Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*

- A. Section 11343(a), 49 U.S.C. § 11343(a)
- B. Section 11344(b) and (c), 49 U.S.C. § 11344 (b) and (c)
- C. Section 11347, 49 U.S.C. § 11347

III. Rail Passenger Service Act, 45 U.S.C. § 501, *et seq.*

- A. Section 405(a) and (b), 45 U.S.C. § 565(a) and (b)

## I. Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## II. Interstate Commerce Act, 49 U.S.C. § 10101, et seq. (Relevant Excerpts)

### A. Section 11343(a), 49 U.S.C. § 11343(a)

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III or chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the property or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.



(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

### B. Section 11344(b) and (c), 49 U.S.C. § 11344(b) and (c)

(b)(1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result form the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse affect on competition among rail carriers in the affected region.

(2) In a proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

### C. Section 11347, 49 U.S.C. § 11347

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employ-



ees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

## III. Rail Passenger Service Act, 45 U.S.C. § 501, et seq. (Relevant Excerpt)

### A. Section 405(a) and (b), 45 U.S.C. § 565(a) and (b)

(a) A railroad shall provide fair and equitable arrangements to protect the interests of employees, including employees of terminal companies, affected by a discontinuance of intercity rail passenger service whether occurring before, on, or after January 1, 1975. A "discontinuance of intercity rail passenger service" shall include any discontinuance of service performed by railroad under any facility or service agreement under sections 305 and 402 of this Act pursuant to any modification or termination thereof or an assumption of operations by the Corporation.

(b) Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; (4) assurances of priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting indiivdual employees against a worsening of their positions with respect to their employment which shall in no

event provide benefits less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act. Any contract entered into pursuant to the provisions of this title shall specify the terms and conditions of such protective arrangements. No contract under section 401 (a)(1) of this Act between a railroad and the Corporation may be made unless the Secretary of Labor has certified to the Corporation that the labor protective provisions of such contract afford affected employees, including affected terminal employees, fair and equitable protection by the railroad.



## APPENDIX B

### *New York Dock* Conditions (Relevant Excerpts)

1(a)—"Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

• • • •

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements: *provided*, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; *provided further*, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement

4. *Notice and agreement or decision.*—(a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.



(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

## APPENDIX C

***Washington Job Protection Agreement of 1936***

**(Relevant Excerpts)**

* * * *

*Section 4.* Each carrier contemplating a coordination shall give at least ninety (90) days written notice of such intended coordination by posting a notice on bulletin boards convenient to the interested employes of each such carrier and by sending registered mail notice to the representatives of such interested employes. Such notice shall contain a full and adequate statement of the proposed changes to be effected by such coordination, including an estimate of the number of employes of each class affected by the intended changes. The date and place of a conference between representatives of all the parties interested in such intended changes for the purpose of reaching agreements with respect to the application thereto of the terms and conditions of this agreement, shall be agreed upon within ten (10) days after the receipt of said notice, and conference shall commence within thirty (30) days from the date of such notice.

*Section 5.* Each plan of coordination which results in the displacement of employes or rearrangement of forces shall provide for the selection of forces from the employes of all the carriers involved on bases accepted as appropriate for application in the particular case; and any assignment of employes made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employes affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13.

---



Excerpts From Washington Job Protection Agreement Journal of Negotiations

* * * *

WASHINGTON, D.C., MAY 13, 1936

Meeting was held with the Labor Executives in Room 1030, Transportation Building, Washington, D.C. at 11:00 A.M.

*PRESENT:*

Messrs.

A. A. Enochs
H. A. Benton
G. E. Bruch
C. A. Clements
E. J. Connors
C. M. Dukes
J. B. Parrish
Jno. G. Walber
William White

E. M. Davis
G. W. Knight
C. C. Handy
J. M. Souby
Ed. Murrin

H. E. Jones
M. L. Long

*Labor Executives:*

Messrs.

G. M. Harrison—Brotherhood of Railway & Steamship Clerks

W. D. Johnson—Order of Railway Conductors

S. R. Harvey—Brotherhood of Railroad Trainmen

Mr. Burke—Brotherhood of Locomotive Engineers

D. B. Robertson—Brotherhood of Locomotive Firemen & Enginemen

T. C. Cashen—Switchmen's Union of North America

F. H. Fljozdal—Brotherhood of Maintenance of Way Employees

A. E. Lyon—Brotherhood Railroad Signalmen of America

B. M. Jewell—Railway Employees' Department, A. F. of L.

J. G. Luhrsen—American Train Dispatchers' Association

Roy Horn—International Brotherhood of Blacksmiths, etc.

Mr. Obie—Order of Sleeping Car Conductors

Donald R. Richberg—Counsel

Mr. Harrison referred to the last conference at which the Joint Conference Committee went over the draft of agreement etc. Mr. Harrison replied that the agreement did not include these services; it applied only to employees covered by agreements and is co-extensive with the schedule agreements.

Section 3. Mr. Enochs stated the conference committee objects to the last clause dealing with corporate organizations, the effect being to bring under the agreement actions of a single carrier. It was also suggested that this subject should be left to the discretion of the Interstate Commerce Commission. Mr. Robertson voiced the opinion that this paragraph was designed to cover cases where two carriers are listed in the agreement each as single carriers but some time later are consolidated by authority of the Interstate Commerce Commission into



one carrier. In such cases it was the thought of the labor executives that the agreement would protect the employees. There was a disagreement between Mr. Robertson and Mr. Harrison on this point. Mr. Harrison explained that the purpose of the clause was that if a single carrier, party to the agreement later unifies their corporate organizations by authority of the Interstate Commerce Commission which resulted in a change in operations, then the agreement would apply, even though the carrier is listed as a single carrier, party to the agreement. He cited as illustrative the Santa Fe and Santa Fe of Texas; the Rock Island and Rock Island and Gulf; Frisco and Frisco of Texas.

• • • •

Section 4—No disagreement.

Section 5. Mr. Enochs stated this should be rephrased using part of the proposals of the labor executives and of the conference committee. A clause should also be inserted providing for settling a dispute in case of failure to agree. Mr. Harrison stated there was no objection to this and they proposed rewriting their Section 13 to cover this matter. It was suggested that a time limit be fixed within which agreement must be reached so that the dispute can be forwarded for settlement. Mr. Harrison explained that they had thought a 30-day limit from the time a dispute arises. Question was raised whether the agreement referred to in this paragraph must be in accordance with seniority rules and practices in effect on the home roads and Mr. Harrison replied that no change in seniority rules or practices on the roads can be brought about by this agreement; that the management and the committees on the roads are the only parties who can modify the schedules. He stated that the assignments must be made in accordance with the rules and practices existing on the home roads but the allotments of employees would be in accordance with the agreement reached.

• • • •

It was suggested that the words "accepted as appropriate" be used instead of "recognized as appropriate" in the first sentence of conference committee proposed Section 5.

At 12:45 P.M. recess was taken util 2:15 P.M.



## APPENDIX D

**Washington Job Protection Agreement of 1936**

**Docket No. 141**

**(Relevant Excerpts)**

**Decision by Referee Bernstein**

Parties to the Dispute

American Railway Supervisors Association
American Train Dispatchers' Association
Brotherhood of Locomotive Engineers
Brotherhood of Locomotive Firemen & Enginemen
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express and Station Employees
Brotherhood Railway Carmen of America
Brotherhood of Sleeping Car Porters
International Association of Machinists
International Brotherhood of Boilermakers, Iron
Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen and Oilers
Railroad Yardmasters of America
Sheet Metal Workers' International Association
Switchmen's Union of North America
Transportation Communication Employees Union

and

Southern Railway System and
Central of Georgia Railway Company

• • • •

The major questions presented are:

(1) Were the job changes complained of the result of "coordinations" within the meaning of Section 2 of the Washington Agreement?

(2) Do Sections 5(2)(f) and 5(11) of the Interstate Commerce Act, and the employee protective conditions

issued pursuant to the former, extinguish the applicability of the Washington Agreement, to which both Carriers are signatories, so that (3) the Carriers were relieved of their obligations to give notice to the Organizations of the intended alleged coordination and to negotiate implementing agreements before the coordinations could be put into effect?

* * * *

(b) *The applicability of the Washington Agreement*—

Acting under Section 5(2) of the Interstate Commerce Act,[1] the ICC approved the Southern's acquisition of control of Central on condition that certain employee protective conditions, in substance the New Orleans Conditions, be afforded affected employees. These conditions apply the "Oklahoma Conditions" which although patterned after the Washington Agreement, differ from it in several major respects—the guarantee to employees deprived of employment is 100% of test period average earnings rather than 60% and the maximum duration of protection is four years rather than five—and a few minor ones; moreover, where the Washington Agreement would yield more "compensation," an employee is entitled to receive it. This pattern derives from the *New Orleans Union Passenger Terminal Case*, 282 ICC 271. In its first decision in that case (267 ICC 763) the Commission imposed protective conditions which would have expired four years from the effective date of its order, interpreting Section 5(2)(f) as imposing such duration as a maximum. However, the construction of the terminal was to take most of that period, thereby rendering the "protection" practically meaningless. The Supreme Court held that the four year period specified in Section (5) (2) (f) was not a maximum but a minimum and remanded the case to the Commission. In turn the Commission added the Washington Agreement compensation terms to those of the Oklahoma Conditions so as to extend the protection for a longer period. So, when the Commission has imposed the New Orleans Conditions up to the time of this case it has included the Washington Agreement specifically, making express mention, however, of only the monetary protections.

[1] It provides:

> As a condition of its approval, under this paragraph (2) of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers, prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.



At issue is whether the non-monetary procedural aspects of the Washington Agreement must be observed when railroads affect coordinations after their corporate affiliation is authorized by the ICC and the Commission prescribes conditions for the protection of employees. Section 4 of the Washington Agreement requires advance notice of an intended coordination and Section 5 of the Agreement requires an agreement between carrier and union before a coordination may be put into effect. Dockets Numbered 70 and 57.

The Washington Agreement came into being in May 1936; Section 5(2)(f) dates from September 1940. The history and purpose of each must be understood in order to determine their interrelation.

As noted in Docket No. 106, in the railroad industry the recognition and scope provisions of rules agreements

commonly are regarded as defining jurisdiction and job "ownership" which prohibit the transfer of work from employees under one agreement to employees—even in the same craft—under another rules agreement. As a result, combining the work of employees of two carriers or shifting work from the employees of one carrier to those of another, the most common means of effectuating coordinations, could not be accomplished without incurring penalty payments to those employees who lost the work. As the savings to be achieved by reducing employment by the combination and rationalization of work of two or more carriers is a major purpose of railroad mergers and acquisitions, a means to overcome the barrier imposed by the rules agreements was necessary. The Washington Agreement serves that purpose—it permits such combinations and transfers of work under specified conditions —including notices of intended coordination, negotiated implementing arrangements, guarantees for employees whose earnings or employment are adversely affected and other benefits. The Agreement—although concluded under the threat of legislation unwelcome to both railroad management and organized labor—was a voluntary private collective agreement entered into by the major railroads and railroad labor organizations to enable the carriers to achieve mergers and to cushion their impact upon employees. Since 1936 many railroads have acceded to the Agreement so that its scope among carriers now is almost universal, although some few unions representing railroad employees are not signatories.

Section 5(2)(f), enacted in 1940, directs the Interstate Commerce Commission to impose conditions for the protection of employees in merger and other cases. In intent and practice those conditions are much like those of the Washington Agreement. The labor organizations declared at the hearings on the measure that they sought to achieve similar employee protections on railroads which then did not subscribe to the Washington Agreement. Other provisions of the 1940 Act relieved the carriers of the threat of mandatory mergers hanging over their heads from



earlier Transportation Acts. In the period preceding enactment in 1940 there was no recalcitrance by railroad labor organizations which arguably required any limitation upon their rules agreements and the job ownership they often were taken to imply; no one contended that the Washington Agreement was inadequate to its tasks. Nothing in the legislative history of Sections 5(2)(f) or 5(11) was presented which even remotely shows an intention by Congress, or anyone else, to abrogate the rules arrangements, including their merger-barring effect and the Washington Agreement's machinery for overcoming them. Indeed, as noted below, the legislation specifically recognizes the desirability and validity of such private arrangements.

Quite clearly Section 5(11) operates to relieve carriers involved in a merger approved by the ICC of any requirement for State agency approval, the antitrust laws and other Federal, State or municipal law. Although the claim is made that this section reaches so far as to overcome provisions of the Railway Labor Act as applied to the Washington Agreement, the context and pattern of the section suggest otherwise. All of the references are to corporate, antitrust and State and local regulatory laws—there is no hint that labor-management relations are involved. Nothing in the legislative history was brought forward to suggest that a wholesale change in the procedures of the Railway Labor Act for modifying rules agreements—assuredly a fundamental and important change—was intended. Any such endeavor would have meant a major legislative battle on the point; but no such thing occurred. It staggers the imagination that so radical a change was in fact meant and made without anyone noticing at the time.[2] Nor was such an effect necessary as to mergers because the Washington Agreement provided the mechanism to accomplish them. (The

[2] Note 2 in Brotherhood of Locomotive Engineers v. Chicago and N.W. Ry. Co., (CAS, 1963) 314 F.2d 424, 432 is not persuasive on this point. Such comparisons may be indicative but are hardly dispositive of Congressional intent.

Harrington Amendment was an unsuccessful attempt to get more than the Agreement gave employees; its rejection by Congress does not mean that where their national agreement applied they were to get less.) As noted many years ago by Referee Gilden in the opinion in Docket No. 27:

> The Transportation Act of 1940, of which Section 5(2)(f) of the Interstate Commerce Act is a part, was enacted with full knowledge and thorough familiarity with the terms of the Washington Agreement. There is no discernible manifestation of any Congressional design to emasculate it entirely or otherwise to thwart or subdue its potency. Actually, its legislative history reveals an affirmative willingness by Congress to permit the protective features embodied in the Washington Agreement to continue unimpaired alongside of those imposed by the statute on the Interstate Commerce Commission. . . .
>
> Implicit in the pronouncement made to Section 5(2)(f) to the effect that, notwithstanding the relief afforded in that provision and certain other sections, the Carriers and the authorized representatives of their employees could, nevertheless, thereafter enter into contractual arrangements for the protection of employee interests adversely affected by Carrier transactions, is the recognition that all existing prior understandings, arrived at by the same principals, dealing with the identical subject, and similarly designed to serve the very same purpose, are also sanctioned.

In that case the Carriers argued that Section 5(2)(f) vitiated the Washington Agreement. The Referee rejected the contention, also noting that Carriers had not given any indication of withdrawing from the Washington Agreement.

In Docket No. 64 I rejected a similar contention by the Organization that an outstanding Commission order imposing the New Orleans conditions (which included the



arbitration provisions of the Oklahoma Conditions), issued pursuant to Section 5(2)(f), precluded application of the Washington Agreement's procedure. I noted that the earlier ruling was made in the face of ICC conditions much like the Oklahoma Conditions. The differences between those arbitration provisions and those in the ICC order in the Southern-Central case provide no reason for a different conclusion here.

Carriers also argued that Docket No. 64 differs from this case because in the former the Commission expressly imposed the New Orleans Conditions which import the Washington Agreement. Docket No. 27 is not subject to such a distinction. In Docket No. 64 the Carrier argued that applicability of the Washington Agreement both under the authority of Docket No. 27 (deciding that Section 5(2)(f) and the Agreement coexist) and that the ICC-imposed conditions included the Washington Agreement. My decision was based upon the former ground.

The interplay of the Washington Agreement and the Railway Labor Act must be understood. The Agreement was designed to facilitate mergers, consolidations, and the like but on stated conditions (notice, implementing agreement, benefits to those adversely affected). The Railway Labor Act prevents either carriers or unions from making unilateral changes in those agreed provisions; the Agreement also has limits upon the termination of its applicability. Hence when a merger etc. is undertaken before the required steps to end the Agreement are taken this Agreement binds the union to permit the job combinations required by the merger and requires the carriers involved to follow its procedures and accord its benefits. The recognition given the Washington Agreement in the last sentence of Section 5(2)(f) indicates that Congress regarded such a private contractual arrangement as harmonious with the ICC power to impose employee protective conditions. That provision should be read with Section 5(11). The recognition and encouragement thereby accorded the Agreement argues

that it is not overridden by Section 5(2)(f) nor is the protection accorded to the Agreement by Section 6 of the Railway Labor Act vitiated.

After the Section 13 Committee's hearings and executive sessions the Southern submitted a memorandum citing, for the first time,[3] authorities which arguably would lead to a different conclusion. While language in all of them indicates the broad scope of Section 5(11), the differing contexts and issues of the cited cases and this set of cases involving the Southern and Central of Georgia must be taken into account. Texas v. United States, 292 U.S. 522, 533-34 (1934) and Schwabacher v. United States, 334 U.S. 182, 200, 201 (1947) are hardly opposite. Kent v. CAB, (2d Cir. 1953) 204 F2d 263, is put forward for the proposition that federal agency power in carrier merger cases extends to overriding private collective agreements. The court there dealt with the CAB's power which it likened to that of the ICC; it also compared the CAB's power to override a collective agreement dealing with the normal subjects of such contracts with the way in which collective agreements take precedence over individual contracts of employment under the National Labor Relations Act—an example of how a court may blur innumerable differences which are apparent and important to those familiar with the many peculiarities of labor relations and agreements in different fields (to say nothing of the many differences in the applicable statutes) and parlay them into possibly unwaranted propositions. Among the many differences in the situations discussed in that case and this group of cases is that the last sentence of Section 5(2)(f) explicitly provides for the concurrent existence, and there-

[3] I have received and considered all the material and arguments submitted by the parties no matter how late in the proceeding some of it was submitted. Certain material does not require extended comment, e.g., copies of letters from the Commission's Congressional Liaison Office, the Commission chairman and other commission officials purporting to show that certain parts of the Washington Agreement were not included in the Commission's orders. Their probative value seems negligible.



by operative effect, of private agreements providing employee protection and ICC-imposed conditions.

Brotherhood of Locomotive Engineers v. Chicago and N.W. Ry. Co., (8th Cir. 1963), 314 F.2d 424, dealt with a railroad merger situation in which the parties agreed that a somewhat modified version of the Washington Agreement provided "a fair and equitable arrangement for the protection of interests of such employees as provided in Section 5(2)(f) . . ." and the Commission adopted the agreed upon arrangements in its order approving the purchase of one carrier's facilities and rights by another looking to the coordination of some facilities. The acquiring carrier gave the required Section 4 notice and sought to negotiate an implementing agreement. The carrier sought arbitration when negotiations stalled in the face of a union contention that the coordination constituted changes in rules which could only be accomplished under the procedures prescribed by the Railway Labor Act for such changes. In this context the court held that Section 5(2)(f) displaced the requirements of the Railway Labor Act. Quite apart from the dubious reliance upon Kent v. CAB for that conclusion, the case does not present any conflict between Section 5(2)(f) and the Washington Agreement. Indeed it was a modified version of the Agreement concluded by the parties that was being enforced under Section 5(2)(f); no challenge to the last sentence of Section 5(2)(f), validating private employee protective agreements, was involved. (N.B.: The Court's caution that "We limit our decision to the peculiar factual situation of the present case." 314 F.2d at 434.) These cases, then, do not lead to the conclusion that Section 5(2)(f) displaces the Washington Agreement.

The Section 13 Committee has processed many cases involving the New Orleans and other conditions and innumerable implementing agreements under the Washington Agreement have been concluded despite the prior issuance of ICC orders imposing various protective con-

ditions. This pervasive and consistent conduct is at odds with the Carriers' assertion that the Washington Agreement is a nullity.

Congress did override the Railway Labor Act when the dispute over firemen and crew consist did not respond to innumerable emergency boards and a presidential commission and threatened a national tie-up of rail transportation. Only then did the President propose and Congress reluctantly provide that a public agency (other than the Commission as originally proposed by the President) impose terms of employment. It approaches the absurd to entertain the notion that essentially the same thing happened *sub silentio* in the 1940 enactment of Sections 5(2)(f) and 5(11) where no such crisis had existed, no bargaining stalemate had occurred, and no stoppage impended.

The background and purpose of the Washington Agreement and Section 5(2)(f) differ. The first is a voluntary national collective bargaining agreement which stems from the peculiar nature of railroad rules agreements—it is the key which unlocks the rules preventing transfer and consolidation of work. Section 5(2)(f) is a statutory requirement which comes into play when carriers seek governmental permission to merge facilities. It is the price imposed by government for such permission in the interest of balancing employee interests with those of carriers and the public.[4] In seeking that permission carriers do not seek relief from another private agreement; they accept the Commission's terms for the grant of government permission to take certain steps.

[4] "Nor do we perceive any basis for saying that there is a denial of due process by a regulation otherwise permissible, which extends to the carrier a privilege relieving it of the cost of performance of its carrier duties, on condition that the savings be applied in part to compensate the loss to employees occasioned by the exercise of the privilege." United States v. Lowden, 308 U.S. 225, 240 (1939) speaking of the predecessor provision of Section 5(4)(b). The Court equated Section 5(4)(b) with the then pending bills which brought forth Section 5(2)(f).



While typically employee organizations intervene, they do so to avert actions which they believe will shrink employment opportunities and to maximize the protections afforded employees. The protective conditions granted often are superior in many respects to those in the Washington Agreement balanced off in some degree by somewhat more restrictive details. Because of this they usually have been accepted, even if more favorable conditions were sought from the Commission or the courts. No Commission action indicates an attempt to abrogate the Washington Agreement, although some of its conditions adopt the Washington Agreement with minor modifications. I doubt that the Commission could override the Washington Agreement if it wanted to; it can order higher benefits and impose them upon the carriers as the price of approving what they seek; but a more compelling showing of Congressional intention is required to obliterate a nationwide collective agreement not objected to by either management or labor—or, indeed any governmental agency—and supersede it with governmentally imposed conditions. More than two decades of conduct by railroad management and unions and by the Commission belie such a result. As the Commission noted in its announcement of February 17, 1964, (320 I.C.C. 377) in this case: it did not intend to supplant the Washington Agreement and, indeed, its protective orders have been patterned after that agreement. The Southern argues that the ICC (despite what it said in its 1964 statement) meant its arbitration provisions to displace those provided by Section 13 of the Agreement and offered the following quotation from the Commission (317 ICC 566):

> The possibility also exists that a carrier will refuse to accept arbitration procedures under paragraph 8 and require employees to invoke the provision of section 13 of the Washington Agreement, which involves a permanent committee whose decisions may be subject to protracted delay after a claim is made. In our opinion, fairness and equity

require adoption with some modification, as hereinafter set forth, of the condition urged by the association with respect to arbitration, which will make mandatory the submission to binding arbitration of disputes not settled by agreement between the carrier and the employee.

This language seems to say that the Section 13 Committee arbitrament is available but might be too slow, hence the Commission was providing an arbitration provision thought to be superior. This is quite different from saying that the Section 13 Committee procedure was to be superseded. Moreover, it hardly seems likely that the Commission would have concerned itself with Section 13 if it did not believe that the remainder of the Washington Agreement applied, for otherwise the Section 13 Committee would have no authority to act.

Given the preferred position of collective bargaining in nationwide agreement which provides for negotiation of employment aspects of mergers, (and provides its own machinery for averting deadlocks (See Docket No. 70)) it seems entirely unlikely that the Washington Agreement was cast aside by Congress without specific mention of the fact. This conclusion is all the stronger for the fact that the notice and implementing agreement provisions have proved workable again and again in coordinations between carriers where ICC protective conditions had been issue.

Carrier Members urge that two court proceedings concerning this controversy have led the parties back to the ICC and that its decision should be awaited. In companion cases,[5] the Court of Appeals for the Fifth Circuit declined to rule preferring to have the issue determined preliminarily by the ICC pursuant to the earlier remand of another case by the Supreme Court. The Supreme

[5] Switchmen's Union v. Central of Georgia R. Co., 341 F2d 213 (1965); Brotherhood of Railway Clerks v. Southern R. Co., 341 F2d 217 (1965).



Court of the United States[6] remanded the other case to the district court with instructions to have it remanded to the Commission with instructions "to amend its reports and order as necessary to deal with appellants' [a union's] request that Sections 4, 5, and 9 be included as protective conditions, specifically indicating why each of these provisions is either omitted or included. See United States v. Chicago, I. St. P. & Pac. R. Co., 294 U.S. 499, 511." (The cited case was decided in 1935, before the Washington Agreement, and does not deal with it; it does deal with the requisites of an appellate record where agency action is contested.) Both courts indicated they sought clarification of what the ICC had ruled and why. While the ICC's view of the impact of Sections 5(2)(f) and 5(11) undoubtedly would be influential with the courts, there is no certainty that the Commission will reach that issue. The Court's order seems to require the Commission to explain whether its conditions included certain parts of the Agreement or not and to explain the inclusion or omission; the issue before this Committee may not be dealt with by the Commission. The special history and experience of this Committee and the history of dealings by signatories to the Washington Agreement (some of whom played leading roles in the enactment of the 1940 provision) upon which this decision rests would seem to impart importance to the disposition of the issue of the interrelationship of the Agreement and Section 5(2)(f) in *this* proceeding. The Carriers raised the issue; the Committee is obliged to discharge its functions as best it can.

Southern's letter of July 12, 1966 submitted a copy of motion papers in Gary v. Midland Valley R.R. Co., Civ. No. 5995, (D.C.E.D. Okla) which include a memorandum by the attorney for some of the Organizations contrasting the New Orleans and Southern-Central conditions and declaring the inferiority, from the employees' view-

[6] Railway Labor Executives' Association v. United States 379 U.S. 199 (1964).

point, of the latter to the former. However, even if that analysis is accurate, it does not reach the issue before the Committee—whether the Washington Agreement is vital and applicable despite Section 5(2)(f) of the Act and Commission orders issued pursuant to it. I did not construe the ICC conditions in my draft opinion nor in this final opinion. This opinion is addressed to the interaction of the Act, Commission orders and the Agreement. If the Commission decides that its orders comprehended the notice and implementing agreement provisions of the Washington Agreement and if that decision is sustained, that would be one basis upon which the Agreement is applicable. That is not the basis of this ruling. Rather, the ruling that the Washington Agreement applies is that the background, purpose, and language of Section 5(2)(f) all maintain its operative force, as do the precedents and conduct of this Committee.

For all of these reasons, I conclude that the Washington Agreement was not abrogated nor modified by Sections 5(2)(f) or 5(11) or the ICC orders in Finance Docket No. 21400. Therefore, the Carriers violated the Washington Agreement by putting coordinations into effect without observing the important requirements of Sections 4 and 5. They therefore must (1) compensate employees for any loss of regular compensation or fringe benefits and (2) must give the requisite notices and negotiate the required implementing agreements. Until that is done employees are entitled to full compensation and fringe benefits as if the jobs had not been abolished. Docket No. 106.

When implementing agreements are achieved Washington Agreement benefits will extend through September 15, 1968 (five years from 90 days after June 17, 1963—the point in time when the Carriers, had they fulfilled their obligations, might have been able to expect that an implementing agreement should have been achieved). Indeed, that presumption favors the Carriers.



However, until they do negotiate such an agreement (or this Committee writes one in the event of a deadlock) the Carriers can hardly expect to pay the less than total compensation this Agreement allows to those who observe it. The effect of coordination upon any individual employees is to be determined as of the date such effect occurred. However, such an individual will be entitled to the equivalent of undiminished earnings until an implementing agreement is achieved,[7] after which the allowances payable under the Agreement shall go into effect. They are to be computed on the basis of the date of actual effect.

As to the portion of the decision ordering the Carriers to give the Section 4 notices and negotiate Section 5 implementing agreements, Carriers argue that such an order (1) exceeds the Referee's authority, (2) goes beyond the questions posed, and (3) is unrealistic in view of the many changes made since the coordinations were in fact begun in June 1963. As to (1) and (2), the discussion in Docket No. 106 is pertinent. As to (3), the notices and implementing agreements, of course, must take into account intervening events. But this is quite different from saying that where the parties have contracted to agree upon implementation, a *fait accompli* by the Carriers deprives the Organizations of their contractual rights. The Organizations may persuade the Carriers that other arrangements than those unilaterally made are desirable; in case of deadlock, the Committee may be persuaded or prescribe some other arrangement. That the Carriers' actions and resulting employee relocations, "releases," resignations and the like, may make implementing agreements more difficult to arrange may be a fact of life, but it is no excuse for scrapping integral parts of the Agreement. The Agreement must be observed.

* * * *

[7] The Carriers will, of course, be given credit for any wage or benefit payments employees had received.

## APPENDIX E

***Former Section 5(12) since recodified in 49 U.S.C. § 11341(a)***

(12) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.



## APPENDIX F

***Regional Rail Reorganization Act of 1973,***
**45 U.S.C. § 701, *et seq.* (Relevant Excerpt)**

***Section 503, 45 U.S.C. § 773 (repealed)***

The Corporation shall have the right to assign, allocate, reassign, reallocate, and consolidate work formerly performed on the rail properties acquired pursuant to the provisions of this Act from a railroad in reorganization to any location, facility, or position on its system provided it does not remove said work from coverage of a collective-bargaining agreement and does not infringe upon the existing classification of work rights of any craft or class of employees at the location or facility to which said work is assigned, allocated, reassigned, reallocated, or consolidated and shall have the right to transfer to an acquiring railroad the work incident to the rail properties or facilities acquired by said acquiring railroad pursuant to this Act, subject, however, to the provisions of section 508 of this title.

Supreme Court, U.S.
FILED
NOV 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

(18) (18)

Nos. 89-1027 and 89-1028

# In the Supreme Court of the United States

OCTOBER TERM, 1990

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL., PETITIONERS

*v.*

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, ET AL.

CSX TRANSPORTATION, INC., PETITIONERS

*v.*

BROTHERHOOD OF RAILWAY CARMEN, ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## REPLY BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

JOHN G. ROBERTS, JR.
*Acting Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

ROBERT S. BURK
*General Counsel*
*Interstate Commerce Commission*
*Washington, D.C. 20423*

(18)

## TABLE OF AUTHORITIES


| Cases: | Page |
|---|---|
| *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir. 1963) | 6, 7-8 |
| *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169 (1961) | 11 |
| *Chicago & N.W. Transp. Co.—Abandonment*, 366 I.C.C. 373 (1987), aff'd *sub nom. International Brotherhood of Electrical Workers* v. *ICC*, 862 F.2d 330 (D.C. Cir. 1988) | 8 |
| *Chicago, St. P., M. & O. Ry.—Lease*, 295 I.C.C. 696 (1958) | 8 |
| *CSX Corp.—Control—Chessie System, Inc. & Seaboard Coast Line Industries, Inc.*, 6 I.C.C. 2d 715 (1990) | 13 |
| *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938) | 4 |
| *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) | 5 |
| *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) | 4 |
| *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) | 11 |
| *Louisville & Nashville R.R.* v. *Mottley*, 219 U.S. 467 (1911) | 14 |
| *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542 (1990) | 7 |
| *NLRB* v. *J. Weingarten*, 420 U.S. 251 (1975) | 7 |
| *Norfolk & W. Ry. and New York & St. L. R.R.—Merger, Etc.*, 347 I.C.C. 506 (1974) | 6, 7 |
| *Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. 142 (1950) | 6 |
| *Russello* v. *United States*, 464 U.S. 16 (1983) | 10 |
| *Schwabacher* v. *United States*, 334 U.S. 182 (1948) | 2, 4 |
| *Southern Ry.—Control—Central of Ga. Ry.*, 331 I.C.C. 151 (1967) | 8 |
| *United States* v. *Lowden*, 308 U.S. 225 (1939) | 5-6, 9 |

Cases—Continued: Page

*United Transp. Union* v. *United States*, 905 F.2d 463 (D.C. Cir. 1990) ..... 8
*Warren* v. *United States*, 340 U.S. 523 (1951) ..... 4
*Wilson* v. *New*, 243 U.S. 332 (1917) ..... 14

Constitution and statutes:

U.S. Const. Amend. V:
Due Process Clause ..... 14
Just Compensation Clause ..... 14
Emergency Railroad Transportation Act of 1933, ch. 91, 48 Stat. 211:
§ 9, 48 Stat. 214-215 ..... 11
§ 10(a), 48 Stat. 215 ..... 9, 10
§ 202(15), 48 Stat. 219 ..... 9, 10
Interstate Commerce Act:
49 U.S.C. 10101a ..... 5
49 U.S.C. 11341 ..... 7
49 U.S.C. 11341(a) ..... *passim*
49 U.S.C. 11343 ..... 5
49 U.S.C. 11344 ..... 6
49 U.S.C. 11344(b) ..... 15
49 U.S.C. 11347 ..... 2, 6, 8, 11, 12, 13, 15
Railway Labor Act, 45 U.S.C. 151 *et seq.* ..... 3
Transportation Act of 1940, ch. 722, 54 Stat. 898:
§ 7, 54 Stat. 906-907 ..... 11

Miscellaneous:

84 Cong. Rec. 9882 (1939) ..... 11


# In the Supreme Court of the United States

OCTOBER TERM, 1990

---

No. 89-1027

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL., PETITIONERS

*v.*

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, ET AL.

---

No. 89-1028

CSX TRANSPORTATION, INC., PETITIONERS

*v.*

BROTHERHOOD OF RAILWAY CARMEN, ET AL.

---

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

**REPLY BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS**

---

Section 11341(a) of the Interstate Commerce Act (ICA) provides that a participant in an ICC-approved merger transaction "is exempt from the antitrust laws and all other law, including State and municipal law, as necessary to let that person carry out the transaction" (49 U.S.C. 11341(a)). The question in this case is whether Section

11341(a)'s exemption shields the participant from enforcement of contractual provisions that otherwise would thwart implementation of the merger. See 89-1027 Pet. i. We explained in our opening brief that Section 11341(a) means what it says: it exempts the participant from *all* law, including laws governing the negotiation and enforcement of collective bargaining agreements, to the extent necessary to implement the ICC approved transaction. The court of appeals thus erred in concluding that Section 11341(a) reaches only "positive enactments" and does not preempt laws effectuating contractual rights. Pet. App. 12a-19a.

We restate the question presented in this case because the union respondents exhibit little interest in addressing it. The union respondents do not contest our basic proposition that Section 11341(a) exempts a carrier from enforcement of contractual provisions that otherwise would thwart implementation of a merger. Nor do they make any attempt to defend the court of appeals' view that Section 11341(a) is somehow inapplicable here because it reaches only "positive enactments." Pet. App. 18a. Indeed, the union respondents ultimately concede that Section 11341(a) exempts rail carriers from enforcement of contractual obligations involving the "capital structure" of their railroads. Resp. Br. 43 n.57 (acknowledging *Schwabacher* v. *United States*, 334 U.S. 182 (1948)). They contend, instead, that Section 11341(a) does not apply in this case because the ICC lacks "control over labor matters." Resp. Br. 43 & n.57. See also *id.* at 16, 24, 26, 33. They then invite this Court to decide an entirely different question—one that the court of appeals did not reach, that is the subject of the ICC's proceedings on remand, and that presently is in an interlocutory posture: namely, the ICC's responsibility to impose labor protective conditions under Section 11347 of the ICA.



1. *The union respondents do not defend the court of appeals' reasoning.* The threshold problem with the unions' position is that it bears no relation to what the court of appeals actually decided. The court of appeals did not rule that Section 11341(a) is inapplicable to the enforcement of collective bargaining agreements because those contracts involve labor matters. The court ruled that Section 11341(a) does not apply to enforcement of collective bargaining agreements because Section 11341(a) does not apply to enforcement of contracts of *any* type. Pet. App. 12a-19a.[1] In the court of appeals' view, Section 11341(a) reaches only "positive enactments, not common law rules of liability, as on a contract." Pet. App. 18a.[2]

The union respondents are entitled, of course, to defend a judgment on grounds other than those stated in the court of appeals' opinion. But in making that election, they tacitly concede that the court of appeals' rationale is indefensible. That concession is understandable. As we explained in our opening brief (at 22-27), Section 11341(a) gives a participant in an ICC-approved transaction an ex-

---

[1] The court of appeals spoke in terms of "overrid[ing] contracts" (Pet. App. 12a); however, as we explained in our opening brief (at 22, 24-26), contracts derive their enforceability from common or statute law—in this case the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*

[2] That the court of appeals approached the question as one involving all contracts, and not simply collective bargaining agreements, is evident from its concern that acceptance of the government's argument would give the ICC power to override a "carrier's solemn undertaking, in a bond indenture or a bank loan." Pet. App. 13a. See also, *e.g.*, *id.* at 12a ("Nowhere does [Section 11341(a)] say that the ICC may also override contracts, nor has it ever * * * included even a general reference to 'contracts' much less any specific reference to [collective bargaining agreements]."); *id.* at 18a ("We are confident that Congress did not intend, when it enacted the immunity provision, to override contracts."); *ibid.* ("Congress exhibited a healthy respect for privately negotiated contracts.").

press exemption from *all* law to the extent necessary to carry out the transaction, and the term "law" is understood to include common law rules as well as statutes. See, *e.g.*, *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 99-101 (1972); *Warren* v. *United States*, 340 U.S. 523, 526 (1951); *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78-79 (1938). Furthermore, this Court, in *Schwabacher*, 334 U.S. at 195-201, held that the substantively identical precursor of Section 11341(a), Section 5(11) of the ICA, exempts a participant in an ICC-approved transaction from enforcement of contractual rights—in that case the contractual rights of a carrier's minority shareholders. See Fed. Resp. Br. 27-28. The union respondents have no answer to these points beyond the assertion that they are "inapposite" in this instance because this case involves "labor matters." Resp. Br. 43 n.57.

2. *The union respondents' position is contradicted by the plain language of Section 11341(a).* The union respondents argued to the court of appeals that Section 11341(a) does not reach labor matters, and that court, for good reason, chose not to accept the argument. Section 11341(a), by its terms, does not give "labor matters" special treatment. The union respondents contend that Section 11341(a)'s "plain language" supports their assertion (Resp. Br. 24), but they fail to confront (or even acknowledge) the words Congress actually used. Section 11341(a) expressly exempts participants in ICC approved transactions "from the antitrust laws and from all other law." 49 U.S.C. 11341(a).[3] It makes no mention whatever of a special exception in the case of labor matters. Instead,

[3] The union respondents characterize Section 11341(a) as "an implied repeal statute" (Resp. Br. 24). There is, however, nothing "implied" in the statute at all. By its terms, Section 11341(a) *expressly* exempts participants from all law as necessary to implement an ICC approved transaction.



the Section 11341(a) exemption is subject to only one very important qualification: the exemption extends only so far "as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a).[4] See *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 298-300 (1987) (Stevens, J., concurring).

3. *The union respondents' argument that the ICC has no "jurisdiction" over labor matters is neither relevant nor correct.* The union respondents repeatedly assert that Section 11341(a) should be given a more restrictive reading because the ICC lacks "jurisdiction," "authority," or "control over labor matters." Resp. Br. 16, 24-25, 26, 33, 35, 36, 41, 43 & n.57. This argument fails for two reasons. First, the applicability of Section 11341(a)'s exemption does *not* depend on whether the ICC has "jurisdiction" over the subject matter of the preempted law—Section 11341(a) expressly exempts participants from the "antitrust laws and all other laws" as necessary to carry out an ICC approved transaction. 49 U.S.C. 11341(a). Second, the union respondents' assertion is simply not correct; the ICC's empowering statute requires the agency to consider and address labor matters.

One of the purposes of the ICA's national transportation policy, which is administered by the ICC, is "to promote a safe and efficient rail transportation system" while "encourag[ing] fair wages and safe and suitable working conditions in the railroad industry" (49 U.S.C. 10101a). The ICA gives the ICC "exclusive" authority over transactions involving the consolidation, merger, or acquisition of control of rail carriers (49 U.S.C. 11341(a), 11343). These transactions inevitably affect labor. See *United*

[4] The court of appeals did not reach the question of what constitutes necessity within the meaning of the exemption, and that issue is not presently before the Court in this case.

*States* v. *Lowden*, 308 U.S. 225, 233 (1939). The ICA therefore expressly *requires* the ICC to consider labor matters when performing its "public interest" review of a proposed transaction (49 U.S.C. 11344), and the ICA expressly *requires* the ICC "to provide a fair arrangement" for "employees who are affected by the transaction" (49 U.S.C. 11347). The union respondents' blanket assertions that Section 11341(a) does not apply to labor matters because the ICC has no jurisdiction over such matters cannot be reconciled with the plain terms of the ICA.

4. *The union respondents incorrectly assert that their interpretation is consistent with past practices.* Because the ICA's language provides no comfort for their position, the union respondents must look to other sources for support. They turn first to historical practices. The unions argue (Br. 26-27) that the ICC historically has declined to exercise jurisdiction over labor matters. That is not so. See, *e.g.*, *Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. 142 (1950); *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir. 1963); *Norfolk & W. Ry. and New York, C. & St. L. R.R.—Merger, Etc.*, 347 I.C.C. 506 (1974). The union respondents also rely on a 1934 statement of the Chairman of the ICC that the agency has "no jurisdiction over labor matters." Resp. Br. 26-27. As the unions acknowledge, however, that statement was addressed to the specific question whether the ICC should assist in the enforcement of the RLA. *Ibid.* Moreover, it was made six years prior to Congress's addition to the ICA of the requirement that the ICC impose labor protective conditions on ICC-approved transactions. See Fed. Resp. Br. 35-38.

The union respondents next observe (Br. 13 n.26, 27-29) that, in the past, railroads have occasionally entered into various "lifetime employment" agreements with rail unions in connection with ICC approved mergers. The



unions contend that railroads would not have agreed to such terms if Section 11341(a) had preempted enforcement of the existing collective bargaining agreements. But any such inference is unwarranted. The railroads may have had other reasons for entering into those agreements. They may have concluded that Section 11341(a) would not permit the labor rearrangements they sought because those rearrangements were not "necessary" to carry out their transactions. See 49 U.S.C. 11341(a). The railroads may have sought to avoid litigation or may have found the terms of the "lifetime employment" agreements desirable even if not required. Thus, the existence of those agreements does not provide any useful guidance on the meaning of Section 11341(a).[5]

The union respondents next argue (Br. 28-32) that the ICC's interpretation of Section 11341(a) is a recent innovation. But the ICC expressly stated, as early as 1974, that Section 11341 and its precursors reach collective bargaining rights. See *Norfolk & W. Ry. and New York, C. & St. L. R.R.—Merger, Etc.*, 347 I.C.C. 506, 511-512 (1974) ("the Commission may relieve the railroad from the requirements of [the Railway Labor Act] insofar as is necessary to carry into effect the transaction approved pursuant to section 5(2)").[6] And the courts have applied that interpretation as early as 1963. *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d

---

[5] The union respondents also contend (Br. 7 n.12) that the effect of the ICC's interpretation of Section 11341(a) is to render "unnecessary" the making of such agreements. That is not accurate. The railroads may continue to find such agreements useful for the reasons we describe in the text.

[6] In any event, an agency is entitled to revisit, refine, and reformulate its interpretations in light of its evolving wisdom and experience. See, *e.g.*, *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990); *NLRB* v. *J. Weingarten*, 420 U.S. 251, 265-266 (1975).

424, 432 (8th Cir. 1963) ("We find no express or implied exception of the provisions of the Railway Labor Act from the operative provisions of § 5(11)."). The unions cite (Br. 29-32) two ICC cases that, in their view, indicate that Section 11341(a) does not preempt enforcement of collective bargaining agreements. In both of those cases, however, the ICC stated that the rail carriers were not entitled to Section 11341(a) relief because the requested exemption was not necessary to carry out the ICC-approved transaction.[7]

The union respondents also assert (Br. 32-33) that the ICC has no "expertise" in labor relations. The ICC, however, administers the ICA and obviously is the expert agency as to the interpretation and application of the ICA's labor provisions. Moreover, the ICC cases that the unions cite in support of their assertion involve the ICC's referral of disputes to arbitrators appointed pursuant to the ICC's labor protective conditions (49 U.S.C. 11347). The ICC has authority to review those arbitration decisions, *Chicago & N.W. Transp. Co.—Abandonment*, 366 I.C.C. 373 (1987), aff'd *sub nom. International Brotherhood of Electrical Workers* v. *ICC*, 862 F.2d 330 (D.C. Cir. 1988). The ICC's referral of these matters simply reflects a sensible use of the arbitration process. See *United Transp. Union* v. *United States*, 905 F.2d 463, 470 (D.C. Cir. 1990).

---

[7] See *Southern Ry.—Control—Central of Ga. Ry.*, 331 I.C.C. 151, 170 (1967) ("By its terms, section 5(11) applies only to antitrust and other restraints of law from carrying 'into effect the transaction so approved . . .'. Neither the Washington Agreement nor the specific collective bargaining agreements between these roads and their employees is such a restraint * * *."); *Chicago, St. P., M. & O. Ry.—Lease*, 295 I.C.C. 696, 702 (1958) ("It is apparent that the Railway Labor Act has not prevented the North Western from effectuating the transaction authorized by the prior order.").



5. *The union respondents incorrectly assert that the ICA's legislative history supports their interpretation.* The union respondents also argue (Br. 33-44) that the ICA's legislative history supports their contention that Section 11341(a) contains an implicit exception for labor matters. As we explain in our opening brief (at 29-38), that assertion is incorrect. The legislative record indicates that Section 11341(a) was enacted to encourage mergers and consolidations, which—as Congress must have realized—almost invariably require extensive rearrangement of work forces and alteration of collective bargaining agreements. See *Lowden*, 308 U.S. at 232-234. Moreover, on two occasions—in 1933, and again in 1940—Congress expressly refused to narrow the scope of the ICC's consolidation authority by carving out a special exception for obligations arising from labor agreements. See Fed. Resp. Br. 30-38.

a. As we explained in our opening brief (at 30-34), the Emergency Railroad Transportation Act of 1933 (ERTA) contained temporary provisions (Title I) and permanent provisions (Title II) concerning rail consolidations. Section 10(a) exempted carriers affected by orders under Title I from other legal "restraints or prohibitions," see § 10(a), 48 Stat. 215, but also contained a proviso expressly preserving collective bargaining agreements. *Ibid.* Section 202(15) exempted carriers affected by orders under Title II from other legal "restraints and prohibitions," but it did not contain any such proviso. See § 202(15), 48 Stat. 219. As we also pointed out (Br. 33-34), Congress's decision to include a proviso preserving collective bargaining agreements in the temporary provisions of Title I, but not to include such a proviso in Section 202(15) as part of the permanent provisions of Title II, confirms Congress's intent that Section 202(15) could operate to limit the enforcement of collective bargaining agreements. See,

*e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983). And it is Section 202(15) that is now Section 11341(a).

The union respondents attempt, unsuccessfully, to rebut that inference. They argue (Br. 37-38) that Section 10(a) in Title I contained the proviso protecting collective bargaining rights because it addressed the authority of the Federal Railroad Coordinator, who had jurisdiction over labor matters. The unions then contend that there was no need to state this restriction expressly in Section 202(15) in Title II because it dealt with the authority of the ICC, which (in the unions' view) did not have power over labor matters. This distinction between the role of the Coordinator and that of the ICC is both inapposite and flawed. The unions mistakenly presume that carriers acting pursuant to ERTA orders were exempt from legal "restraints or prohibitions" (§ 10(a), 48 Stat. 215; § 202(15), 48 Stat. 219) *only* to the extent that the restraint or prohibition fell within the subject matter jurisdiction of the agency that issued the order. Neither Section 10(a) nor Section 202(15) contained any such limitation; instead, carriers were "relieved from the operation of the antitrust laws * * * and of *all* other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order." § 202(15), 48 Stat. 219 (emphasis added).[8]

In any event, Section 10(a) does not support the union respondents' distinction between the role of the Coordinator and the role of the ICC. Section 10(a)'s exemption and its associated proviso apply to actions taken by the Coordinator *or* the ICC pursuant to Title I. See § 10(a), 48 Stat. 215 ("The carriers or subsidiaries subject to the Interstate Commerce Act, as amended, affected by any

[8] As we have observed (p. 5, *supra*), the union respondents employ the same mistaken premise with respect to Section 11341(a).



order of the Coordinator *or Commission* made pursuant to this title shall, so long as such order is in effect, be, and they are hereby, relieved from the operation of the antitrust laws * * * and of all other restraints or prohibitions by law * * *.") (emphasis added). Title I provided that the ICC had authority to review and, if necessary, modify the Coordinator's orders and hence the ICC's power over labor matters was of comparable scope. See ERTA § 9, 48 Stat. 214-215.

b. Nor do the union respondents have an adequate response to Congress's actions in 1940. As we stated in our opening brief (at 35-38), when Congress enacted the Transportation Act of 1940, further amending the ICA, it specifically rejected an amendment that the unions now insist is the law. Representative Harrington's proposed amendment would have prohibited "the impairment of existing employment rights of said employees." See 84 Cong. Rec. 9882 (1939). Congress rejected the Harrington Amendment and enacted in its place a provision (§ 5(2), now codified as Section 11347 of the ICA) that directs the ICC to require a "fair and equitable arrangement" for employees who are adversely affected by ICC approved transactions. § 7, 54 Stat. 906-907. See Fed. Resp. Br. 35-38. The union respondents argue (Br. 39 n.55) that Congress "modified"—rather than "rejected"—the Harrington Amendment. Even if one accepts the unions' semantic distinction, our point remains valid: "Congress d[id] not intend *sub silentio* to enact statutory language that it ha[d] earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987). See *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 175-177 (1961).

6. *The union respondents' reliance on Section 11347 is misplaced.* The union respondents next argue (Br. 45-47) that Section 11347 prohibits the ICC from modifying or

eliminating an employee's contractual rights. The issue decided by the court of appeals and the issue before this Court is whether Section 11341(a) exempts participants from enforcement of contractual obligations. See Pet. App. 12a-19a. More specifically, the question is whether Section 11341(a)'s phrase "all other law" includes the law governing the enforcement of contracts in general and collective bargaining agreements in particular. The unions invite this Court to resolve a wholly distinct issue—the meaning of Section 11347—that the court of appeals did not decide, that the ICC has addressed in the remand proceedings, and that the court of appeals has not yet had an opportunity to review.[9]

Section 11347, which originated in the Transportation Act of 1940 (see p. 11, *supra*), directs the ICC to impose conditions on ICC-approved transactions requiring carriers "to provide a fair arrangement" for employees who are adversely affected by implementation of the transaction. 49 U.S.C. 11347. Rail labor and rail management have been engaged in a longstanding dispute over the content and import of those conditions. Rail labor contends that under Section 11347 the ICC must impose, as a term of the ICC-approved transaction, requirements that the carriers' employees retain all of their rights under the RLA and existing collective bargaining agreements and receive certain additional compensation. See Resp. Br. 45-47. Rail management disagrees, contending that Section 11347 requires the ICC to impose terms that provide for arbitration of disputes arising from work force adjustments and

[9] The union respondents raise a number of other issues that are not presented in this case, including whether the overriding of contractual obligations was, in the particular circumstances, "necessary" to the transaction (Br. 26), and the particular facets of the "Orange Book" agreements (Br. 46 n.59), a matter peculiar to certain aspects of the dispute in No. 89-1028.



for compensation to employees adversely affected by the transaction. See 89-1027 Pet. Br. 43-47.

We submit that if Section 11347 has any relevance to the present issue, it cuts against the unions' position. Congress enacted Section 11347 in recognition that employees would be adversely affected by ICC-approved transactions. See Fed. Resp. Br. 37-38. Congress's requirement of protective conditions with respect to those effects evidences Congress's view that implementation of ICC-approved rail consolidations and mergers is likely to impair collective bargaining agreements. Beyond this limited observation, which takes note of the parallel existence of Section 11347 and its announced purpose, we believe it is neither necessary nor provident for this Court to reach a concluded view on the meaning of that Section. Section 11341(a) concerns the *legal consequences* flowing from ICC approval of a rail transaction. That issue, as *Schwabacher* illustrates, has importance outside of, as well as within, the rail labor context. Section 11347 is concerned solely with what labor terms must be included *as part of the transaction*. The resolution of the Section 11341(a) issue is critical, but it will not finally determine labor's rights.

Moreover, the ICC issued a decision, following the court of appeals' remand of the record in this case, that addresses the ICC's responsibility under Section 11347. See *CSX Corp.—Control—Chessie System, Inc. & Seaboard Coast Line Industries, Inc.*, 6 I.C.C. 2d 715 (1990). That decision is subject to judicial review in the court of appeals. This Court, in turn, will have the opportunity to review, if necessary and after full briefing, the court of appeals' considered judgment on this matter.

7. *The ICC's interpretation of Section 11341(a) does not deprive parties of Fifth Amendment rights.* The union respondents contend (Br. 47-50) that the ICC's interpreta-

tion of Section 11341(a) would deprive the unions (and presumably those they represent) of property in violation of the Due Process and Just Compensation Clauses of the Fifth Amendment. There is no merit to that contention. As the unions concede (Br. 48), it has long been settled that Congress may limit or bar the enforcement of existing contracts if it rationally concludes that such action is in the public interest. See *Wilson* v. *New*, 243 U.S. 332, 348-354 (1917); *Louisville & Nashville R.R.* v. *Mottley*, 219 U.S. 467, 480-481 (1911). Section 11341(a) plainly satisfies that test: it exempts a carrier from enforcement of contractual provisions to the extent necessary to permit the carrier to implement a transaction that has been found to be in the public interest.

The unions' claim of contractual impairment is particularly weak in this case because the collective bargaining agreements at issue were entered into long after Section 11341(a) had become an established part of the legal landscape. Section 11341(a) dates back to the Transportation Act of 1920, and has for 70 years been a part of the legal context in which rail labor agreements have been negotiated. Thus, the union respondents' contracts were necessarily subject to Section 11341(a)'s preemptive effect at the time they were negotiated, and no claim of an unconstitutional taking can arise from the incidence of that effect. Indeed, even if the unions could claim deprivation of a property right, the ICA's labor protective conditions, set forth in Section 11347, would assure compensation for any such deprivation.

8. *The union respondents' arguments cannot be reconciled with the purpose of the ICA consolidation provisions.* The ICA's consolidation provisions are intended to foster those mergers that are in the public interest, while at the same time accommodating to the fullest extent possible the competing claims of persons, including employees,



who may be adversely affected by the transactions. See Fed. Resp. Br. 39-40. The ICA is particularly solicitous of rail labor interests: the ICC must take into account the interests of rail employees when conducting its public interest review (49 U.S.C. 11344(b)) and must impose special conditions to protect the interests of employees who are adversely affected by the transaction (49 U.S.C. 11347). Finally, Section 11341(a) exempts a participant from other law, but only to the extent "necessary to let that person carry out the transaction." 49 U.S.C. 11341(a). Notwithstanding these provisions, the union respondents insist that rail employees are entitled to full enforcement, under the Railway Labor Act, of all of the terms of their collective bargaining agreements. The RLA's "virtually endless" process would pose a serious impediment to the consummation of rail mergers. See Fed. Resp. Br. 40-42. Section 11341(a) does not implicitly except that process, uniquely among "all other law" (49 U.S.C. 11341(a)), from its preemptive sweep.

## CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**

ROBERT S. BURK
*General Counsel*
*Interstate Commerce Commission*

NOVEMBER 1990

---

* The Solicitor General is disqualified in this case.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—282-061/20215

Supreme Court, U.S.
FILED
NOV 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1028

# In The Supreme Court of the United States October Term, 1990

**CSX TRANSPORTATION, INC.,**
*Petitioner,*

*v.*

**BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,**
*Respondents.*

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

## REPLY BRIEF FOR THE PETITIONER

JAMES S. WHITEHEAD
*(Counsel of Record)*
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703

NICHOLAS S. YOVANOVIC
JAMES D. TOMOLA
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

*Attorneys for Petitioner*
*CSX TRANSPORTATION, INC.*

November 23, 1990

## TABLE OF CONTENTS

Introduction ..... 1

Argument ..... 5

I. The Court of Appeals' Decision Is Contrary to Prior Decisions of this Court ..... 5

II. The Plain Terms of § 11341(a) Immunize Rail Carriers from Obligations in Collective Bargaining Agreements that Impede an ICC- Approved Rail Consolidation ..... 6

III. The Legislative History of the ICA's Immunity Provisions Establishes that Congress Intended to Encompass Obligations Arising from Rail Collective Bargaining Agreements ..... 10

IV. ICC's Interpretation of the Scope of the ICA Immunity Provisions Does Not Result in a Fifth Amendment Violation ..... 18

Conclusion ..... 20

## TABLE OF AUTHORITIES


**CASES** *Page*

*Brotherhood of Loc. Eng'rs* v. *Boston & Maine Corp.*, 788 F.2d 794 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986) ..... 14

*Brotherhood of Loc. Eng'rs* v. *ICC*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd*, 482 U.S. 270 (1987) ..... 14

*Brotherhood of Maint. of Way Employees* v. *United States*, 366 U.S. 169 (1961) ..... 3, 13

*Burlington N. R.R.* v. *United Transp. Union*, 848 F.2d 856 (8th Cir.), *cert. denied*, 109 S. Ct. 499 (1988) ..... 14

*Central New England Ry.* v. *Boston & Albany R.R.*, 279 U.S. 415 (1929) ..... 19

*Chang* v. *United States*, 859 F.2d 893 (Fed. Cir. 1988) ..... 18

*Colorado* v. *United States*, 271 U.S. 153 (1926) ..... 19

*Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986) ..... 18

*County of Marin* v. *United States*, 356 U.S. 412 (1958) ..... 3

*CSX Corp.—Control—Chessie Sys. & Seaboard Coast Line Indus.*, 363 I.C.C. 521 (1980) ..... 9, 10

*CSX Corp.—Control—Chessie Sys. & Seaboard Coast Line Indus.*, 4 I.C.C. 2d 641 (1988). ..... 6

*CSX Corp.—Control—Chessie Sys. & Seaboard Coast Line Indus.*, 6 I.C.C. 2d 715 (1990)) ..... 4

*CSX Corp.—Control—Chessie Sys. & Seaboard Coast Line Indus.*, Finance Docket No. 28905 (Sub-No. 22) (served July 10, 1990) ..... 4

*CSX Corp.—Control—Chessie Sys. & Seaboard Coast Line Indus.*, Finance Docket No. 28905 (Sub-No. 23) (served Oct. 3, 1989) ..... 9





**CASES** *Page*

*Delaware & Hudson Ry.—Lease and Trackage Rights Exemption*, 1989 ICC LEXIS 9 (1989) ..... 15

*Denver & R. G. W. R.R.—Trackage Rights—Missouri Pac. R.R.—Between Pueblo, Co. and Kansas City, Mo.*, Finance Docket No. 30,000 (Sub-No. 18) (served Oct. 25, 1983), *vacated and remanded sub nom. Brotherhood of Loc. Eng'rs* v. *ICC*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd*, 482 U.S. 270 (1987) ..... 14

*Florida E. C. Ry.* v. *United States*, 259 F. Supp. 993 (M.D. Fla. 1966), *appeal of RLEA dism'd as moot*, 386 U.S. 544 (1967) ..... 17

*Gulf, M. & O. R.R.—Abandonment*, 282 I.C.C. 311 (1952) ..... 16

*ICC* v. *Brotherhood of Loc. Eng'rs*, 482 U.S. 270 (1987) ..... 2, 6, 14

*Louisville & N. R.R.* v. *Mottley*, 219 U.S. 467 (1911) ..... 18

*Missouri Pac. R.R.—Merger*, 348 I.C.C. 414 (1976), *rev'd sub nom. City of Palestine* v. *United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978) ..... 16

*New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979) ..... 13

*New York* v. *United States*, 257 U.S. 591 (1922) ..... 19

*Norfolk & W. Ry.—Merger*, 347 I.C.C. 506 (1974) ..... 15

*Norman v. Baltimore & O. R.R.*, 294 U.S. 240 (1935) ..... 18

*Peoria & E. Ry. Stockholders* v. *New York Cent. R.R.*, 334 I.C.C. 131 (1968) ..... 9

*Pittsburgh & Lake Erie R.R.* v. *Railway Labor Exec's' Ass'n*, 109 S. Ct. 2584 (1989) ..... 13

*Railway Labor Exec's' Ass'n* v. *United States*, 339 U.S. 142 (1950) ..... 12, 14

**CASES** *Page*

*Railway Labor Exec's' Ass'n* v. *United States*, 575 F. Supp. 1554 (Sp. Ct. RRRA 1983), *cert. denied*, 465 U.S. 1101 (1984) ..... 18

*Railway Labor Exec's' Ass'n* v. *United States*, 675 F.2d 1248 (D.C. Cir. 1982) ..... 13

*Rarus Ry.—Exemption*, 1989 ICC LEXIS 97 (1989) ..... 6

*Regents of the Univ. Sys. of Ga.* v. *Carroll*, 338 U.S. 586 (1950) ..... 19

*Schwabacher* v. *United States*, 334 U.S. 182 (1948) ..... 1, 2, 4, 5

*Seaboard Coast Line R.R.—Investigation of Control & Modification of Traffic Conditions*, 360 I.C.C. 582 (1979) ..... 9

*St. Louis Southwestern Ry.—Trackage Rights*, 1 I.C.C. 2d 776 (1984) ..... 14

*St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298 (1954) ..... 12

*Texas* v. *United States*, 292 U.S. 522 (1934) ..... 12

*United States* v. *Lowden*, 308 U.S. 225 (1939) ..... 2, 3, 5, 6, 8

*United Transp. Union* v. *Consolidated Rail Corp.*, 535 F. Supp. 697 (Sp. Ct. RRRA), *cert. denied*, 457 U.S. 1133 (1982) ..... 18

*Wilson* v. *New*, 243 U.S. 332 (1917) ..... 18

**STATUTES, RULES, and CONSTITUTIONAL PROVISIONS**

49 C.F.R. § 1180.6(a)(2)(v) (1989) ..... 9

49 C.F.R. § 1180.7 (1989) ..... 9

49 C.F.R. § 1180.8 (1989) ..... 9

49 C.F.R. § 1180.9 (1989) ..... 9



*Page*

Emergency Railroad Transportation Act of 1933 ("ERTA"), ch. 91, 48 Stat. 211 ..... 3

Title I ..... 10, 12

§ 4(1)(a)-(c), 48 Stat. 212-13 ..... 11

§ 4(2), 48 Stat. 212-13 ..... 12

§ 5, 48 Stat. 213 ..... 11

§ 7, 48 Stat. 213-14 ..... 12

§ 10(a), 48 Stat. 215 ..... 12

§ 11, 48 Stat. 215 ..... 12

Title II ..... 6, 10

§ 202, 48 Stat. 217-19 ..... 12

Interstate Commerce Act ..... *passim*

§ 5(2)(f) ..... 12, 13

§ 5(8), 41 Stat. 480 ..... 11

§ 5(11), 54 Stat. 908-09 ..... 5, 13

§ 5(15), 48 Stat. 217-19 ..... 12

§ 11341(a), 49 U.S.C. § 11341(a) (1988) ..... *passim*

§ 11343, 49 U.S.C. § 11343 (1988) ..... 2, 7, 8, 9

§ 11343(a)(1), 49 U.S.C. § 11343(a)(1) (1988) ..... 8

§ 11343(b), 49 U.S.C. § 11343(b) (1988) ..... 8

§ 11344(b)(1), 49 U.S.C. § 11344(b)(1) (1988) ..... 8

§ 11344(b)(1)(A), 49 U.S.C. § 11344(b)(1)(A) (1988) ..... 8

§ 11344(b)(1)(D), 49 U.S.C. § 11344(b)(1)(D) (1988) ..... 8

§ 11344(b)(1)(E), 49 U.S.C. § 11344(b)(1)(E) (1988) ..... 8

§ 11347, 49 U.S.C. § 11347 (1988) ..... 4, 13

*Page*

Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act"), Pub. L. No. 94-210, 90 Stat. 31 ..... 13, 14, 15

Railway Labor Act, 45 U.S.C. §§ 151-188 (1988) ..... *passim*

Regional Rail Reorganization Act of 1974 ("3R Act"), Pub. L. No. 93-236, 87 Stat. 986 ..... 16

§ 503 ..... 17

Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 ..... 13, 14

Transportation Act of 1920, ch. 91, 41 Stat. 456 ..... 1, 2, 3, 11

Title III ..... 11

Title IV ..... 11

Transportation Act of 1940, ch. 722, 54 Stat. 898 ..... 3, 6

U.S. Const., amend. v ..... 4, 18

**MISCELLANEOUS**

Conf. Rep. No. 93-744, reprinted in 1973 U.S. Code Cong. & Admin. News 3335 ..... 17

84 Cong. Rec. (1939) ..... 12

*Hearings on S. 2188 and H.R. 9142 Before the Surface Transportation Subcomm. of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. (1973) ..... 16, 17

S. Rep. No. 499, 94th Cong., 1st Sess. (1975) ..... 13

1973 U.S. Code Cong. & Admin. News ..... 16

**No. 89-1028**

# In The Supreme Court of the United States October Term, 1990

**CSX TRANSPORTATION, INC.,**
*Petitioner,*

*v.*

**BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,**
*Respondents.*

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

## REPLY BRIEF FOR THE PETITIONER

## INTRODUCTION

In its initial brief, Petitioner CSX Transportation, Inc. ("CSXT") demonstrated that the holding of the Court of Appeals is in error. The court's ruling that the immunity conferred by ICA § 11341(a) does not reach labor contract obligations is contrary to the express language of the statute, its legislative history, and the public policies underlying our national rail transportation legislation since the Transportation Act of 1920. The decision below is inconsistent with decisions of this Court, principally *Schwabacher* v. *United States*, 334 U.S. 182 (1948), and numerous lower federal court decisions. *See* CSXT Brief at 26-27 and n.31.

The brief submitted by the Union Respondents is noteworthy in several respects:

First, the Union Respondents, like the Court of Appeals below,[1] virtually ignore this Court's controlling and instructive prior decisions. Their attempt to distinguish *Schwabacher* is relegated to a single footnote. Union Resp. Brief at 43 n.57. They fail to acknowledge this Court's recognition in *United States* v. *Lowden*, 308 U.S. 225 (1939), that contractual seniority rights will inevitably be lost in the implementation of an ICC-approved rail consolidation. They do not even cite, much less discuss, the four-justice concurring opinion in *ICC* v. *Brotherhood of Loc. Eng'rs*, 482 U.S. 270, 287 (1987) ("*BLE*").

Second, while the Union Respondents agree that the language employed by Congress is the most important indicator of Congress' purpose (Union Resp. Brief at 24), they then ignore the breadth of the immunity language that Congress has repeatedly used since the Transportation Act of 1920. They do not support the Court of Appeals' view that the absence of the word "contracts" in the ICA immunity section is significant. Pet. App. 12a.[2]

Instead, the Unions suggest, contrary to the explicit findings of the ICC in the instant cases and prior ICC decisions defining the scope of the authority conferred on consolidating rail carriers under ICA § 11343, 49 U.S.C. § 11343 (1988), that the Waycross/Raceland shop consolidation was not authorized by the Commission and, hence, did not qualify for the immunity from "all . . . law" provided by the ICA. There is no merit to the Unions' contention that the immunity conferred on consolidating railroads removes only legal obstacles to the formal corporate and financial reorganization. There is no merit in the Unions' assertion that consolidating railroads must contend with the host of state and federal legal restraints that would prevent the very

[1] The Court of Appeals adopted its narrow interpretation of § 11341 (a) even though no party had even suggested that the ICA immunity provision would not encompass Railway Labor Act collective bargaining agreements or other contractual obligations impeding the implementation of an approved consolidation.

[2] Nor do Union Respondents attempt to defend the Court of Appeals' artificial distinction between the RLA and collective bargaining agreements arising thereunder.



operational changes that result in the economies and efficiencies found by the ICC to make the consolidation consistent with the public interest. *See infra* at pp. 6-10.

Third, the Union Respondents virtually ignore the comprehensive legislative history of the ICA immunity provisions set forth in CSXT's brief. In particular, Union Respondents ignore the instructive history of the Emergency Railroad Transportation Act of 1933 ("ERTA"), where Congress failed to except legal obstacles flowing from the Railway Labor Act and collective bargaining agreements from the permanent ICA immunity grant. The Unions also denigrate the significance of the Transportation Act of 1940, where Congress defeated the Harrington Amendment, which would have prevented the ICC from approving any consolidations that would have affected employee contract rights. *See infra* at pp. 10-14.

Finally, the Union Respondents do not dispute that it has been Congress' consistent purpose since the Transportation Act of 1920 to foster and encourage rail consolidations. *Brotherhood of Maint. of Way Employees* v. *United States*, 366 U.S. 169, 173 (1961); *County of Marin* v. *United States*, 356 U.S. 412, 416 (1958); *United States* v. *Lowden*, 308 U.S. 225, 232 (1939). Nor do they dispute that subjecting rail carriers to the "interminable" bargaining provisions of the Railway Labor Act ("RLA") in order to remove contractual obstacles to consolidation would give rail unions a virtual veto over transactions found by the ICC to be in the public interest.

Instead, the Union Respondents rely on a classic "strawman" argument in an attempt to divert attention from the issue before the Court. They assert that Congress has not chosen to give the ICC "complete control" over day-to-day rail labor relations and that the Commission lacks "expertise" in such matters. These consolidated cases do not present any such issue. The sole issue before the Court is whether the immunity conferred by Congress in ICA § 11341(a) enables rail carriers to carry out approved consolidations notwithstanding legal obstacles flowing

from RLA collective bargaining agreements.[3]

Congress indeed has provided that the on-going, day-to-day relations between rail carriers and rail unions are to be governed by the RLA. However, since 1920 Congress' intent has been equally manifest that, in those instances when obligations arising under any "law", including the RLA and rail labor contracts, impede the implementation of an ICC-approved consolidation, the policies of the ICA must prevail. Congress has chosen that, in such instances, it is the ICA that is to be "the supreme law of the land". *Schwabacher,* 334 U.S. at 198. Union Respondents would have this Court ignore Congress' stated intent and elevate RLA obligations to a position of primacy. Their arguments, like the decision of the court below, are in error.[4]

---

[3] Indeed, the Union Respondents acknowledge in their counter-statement of the Question Presented that the sole issue here is the proper scope of the immunity conferred on consolidating carriers by § 11341 (a). Union Resp. Brief at (i). Thus, as the Union Respondents recognize at page 18 of their brief, issues concerning the scope of the ICC's authority under ICA § 11347, 49 U.S.C. §11347 (1988), and its labor protective conditions, prescribed thereunder, are not before the Court.

Nor is the ICC's decision on remand from the D.C. Circuit (*CSX Corp.—Control—Chessie Sys. & Seaboard Coast Line Indus.*, 6 I.C.C. 2d 715 (1990)) before the Court, notwithstanding the Unions' extensive discussion of it at pp. 10-16 of their brief. In the remand decision, the Commission recognized that it was bound to comply with the mandate of the Court of Appeals. *See id.* at 720, 722, 745. However, the Commission noted that it has argued to this Court in the instant cases "that the Court of Appeals was in error . . . and that § 11341 does furnish a further basis for modification of CBAs . . ." *Id.* at 756 n.34. Furthermore, the Commission has agreed that, if this Court reverses the D.C. Circuit's interpretation of § 11341 (a), it will need to reconsider its remand decision. *CSX Corp.—Control—Chessie Sys. & Seaboard Cost Line Indus.*, Finance Docket No. 28905 (Sub-No. 22) (served July 20, 1990). *See* Petitioner's Supplemental Response to Motion to Dismiss in No. 89-1028 at 10a n. 9, filed on September 22, 1990.

[4] In the closing pages of their brief, Union Respondents raise Fifth Amendment concerns about the interpretation of § 11341 (a) espoused by Petitioners and the Federal Respondents. Their constitutional arguments, like their statutory ones, are without merit. *See infra* at pp. 18-19.



## ARGUMENT

### I. The Court of Appeals' Decision Is Contrary to Prior Decisions of this Court.

Over 40 years ago in *Schwabacher,* this Court declared in sweeping terms that Congress intended the ICA, as a result of its immunity provisions, to be "the supreme law of the land". 334 U.S. at 198. Accordingly, this Court ruled that the Commission, in determining the rights of a shareholder affected by a rail merger, was to look solely to the ICA itself, "not the promise that a charter made to him." *Id.* at 199. The Union Respondents seek to distinguish *Schwabacher* in a single footnote near the end of their brief. They argue that, because Congress granted the ICC "complete control" over rail carrier capital structures and not over rail labor relations, the immunity conferred from legal obstacles in contracts defining shareholder rights is somehow broader than the corresponding immunity from obligations in collective bargaining agreements. Union Resp. Brief at 43 n.57.

The immunity provisions in § 11341(a) permit no such distinction. That section broadly exempts consolidating carriers "from the antitrust laws and *from all other law,* including State and municipal law". Emphasis added. Congress did not limit the scope of the immunity to matters concerning carrier capital structures. Instead, Congress has broadly declared in § 11341(a) that "[t]he authority of the Interstate Commerce Commission under this subchapter [dealing with rail consolidations] *is exclusive.*" Emphasis added.[5] This Court's declaration in *Schwabacher* that Congress intended that statute to be "the supreme law of the land" (334 U.S. at 198) applies equally to the removal of all legal obstacles from whatever source that would impede approved rail consolidations.

This Court had earlier recognized in *United States* v. *Lowden,* 308 U.S. 225 (1939), that seniority rights flowing from rail collective bargaining agreements will inevitably be overridden

---

[5] The immunity provisions in effect at the time of the *Schwabacher* decision, ICA § 5(11), similarly declared that "[t]he authority conferred by this section shall be exclusive and plenary". Pet. App. 119a. This Court observed in *Schwabacher,* "[T]he very fact . . . that the Commission's jurisdiction is 'plenary' and 'exclusive,' argues with equal force that federal law is also plenary and exclusive." 334 U.S. at 198.

in the implementation of an approved merger. The four justices who joined the concurring opinion in *BLE* similarly recognized the scope of the immunity conferred by the ICA.[6] The Court of Appeals' failure to follow these precedents led to its erroneous interpretation of § 11341(a).

## II. The Plain Terms of § 11341(a) Immunize Rail Carriers from Obligations in Collective Bargaining Agreements that Impede an ICC-Approved Rail Consolidation.

The Union Respondents acknowledge that the language used by Congress is the clearest indication of its purpose. Union Resp. Brief at 24. Congress cannot have spoken more clearly when it drafted the ICA immunity provisions in 1920, when it reenacted those provisions in Title II of ERTA and in the Transportation Act of 1940, and when it recodified the ICA in 1978: consolidating carriers are exempt from compliance with all legal obstacles from any sources as necessary to the implementation of an approved transaction. *See* Pet. App. 118a-120a; CSXT Brief at 7a.

The Union Respondents do not contest the breadth of this language; they offer no alternative interpretation. They merely assert at pages 24 and 43 of their brief, without any logical basis, that § 11341(a) is, in effect, "an implied repeal statute" . Neither § 11341(a) nor its historic antecedents have *impliedly* repealed anything. For 70 years these sections have *expressly* immunized consolidating carriers from all legal obligations that would prevent the implementation of an ICC consolidation order.

Rather, Union Respondents seek to support the Court of Appeals' decision on a ground not relied on by the court below.[7] They suggest that the operational changes undertaken by

---

[6] The Union Respondents ignore this aspect of *Lowden* and the *BLE* concurrence in their brief. But even ICC Commissioner Lamboley, on whose dissent in the remand proceedings in this case the Unions rely, has acknowledged that the *BLE* concurrence means that RLA provisions may be displaced in transactions subject to § 11341 (a). *See Rarus R.—Exemption*, 1989 ICC LEXIS 97, *32 n.20 (1989) (Lamboley, dissenting).

[7] The Court of Appeals did not question the ICC's express determination that CSXT's shop consolidation was a transaction "authorized by the Commission's approval in *CSX-Control*." *CSX Corp.–Control–Chessie Sys. & Seaboard Coast Line Indus.*, 4 I.C.C. 2d 641, 648 (1988); Pet. App. 42a.



Petitioners were not entitled to the immunity conferred by § 11341(a) because they are outside the Commission's "jurisdiction". The Unions argue that, once consolidating rail carriers have completed their formal corporate reorganizations (when they have "become one corporation or become the subsidiaries of a parent corporation"), they have exhausted the authority conferred on them by the ICC and are no longer entitled to immunity with respect to subsequent operational changes that are the "results" of such consolidations. Union Resp. Brief at 25-26.[8] As the Unions see it, the authority conferred on consolidating carriers by the ICC is "limited to the financial transactions specified in Section 11343(a)." *Id.* at 37-38.[9] This narrow interpretation of the scope of the "transaction" approved in a consolidation, merger, or control proceeding under ICA § 11343 is contrary to the language and purpose of the Act itself and is also contrary to consistent ICC precedent.

The Union Respondents' interpretation of the "transaction" subject to the immunity prescribed in § 11341(a) would have far-reaching implications that would be in inherent conflict with our nation's transportation policy "to facilitate merger and consolidation in the national transportation system." Under their argument, only the financial terms of a consolidation would be immunized from the restraints of all other laws. Any operational changes, including facility consolidations and service changes, even if found by the Commission to result in substantial public benefit, could be implemented, if at all, only after compliance with a myriad of federal, state, and local laws and ordinances. Congress' declaration in § 11341(a) that "[t]he authority of the Interstate Commerce Commission under this subchapter is exclusive" would be rendered a nullity.

---

[8] Accordingly, the Unions assert that the transaction authorized by the Commission in *CSX—Control* "was consummated in 1980 when CSX exercised the authority granted and assumed control and management of the operation and properties of the two railroad systems." Union Resp. Brief at 2.

[9] Inconsistently, however, they maintain that employees who are affected by "resulting" operational changes are still entitled to the income protection benefits in the Commission's *New York Dock* Conditions. Union Resp. Brief at 26.

Section 11343 itself establishes that Commission approval of a consolidation "transaction" authorizes the carriers to engage in more than a mere "financial" reorganization. Section 11343(a)(1) requires Commission approval of the "consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties." Similarly, § 11343(b) refers to the acquisition of "control" as including "the power to exercise control or *management*" of a carrier "regardless of how that result is reached." Emphasis added.

Under § 11344(b)(1) the Commission must consider several factors in ascertaining whether the proposed consolidation is consistent with the public interest. Such analyses would be totally irrelevant if the "transaction" proposed by the carriers consisted solely of a change in corporate form. The Commission must consider the consolidation's effects on "the adequacy of transportation to the public" and on "competition among rail carriers in the region". § 11344(b)(1)(A), (E). A transfer of securities by itself will not have any effect on transportation services or carrier competitiveness.

Finally, and of greatest relevance here, the Commission must consider "the interest of carrier employees affected by the proposed transaction." § 11344(b)(1)(D). A mere reorganization of ownership will have no impact on employees. Employee interests are affected only by the consolidation of carrier facilities and the coordination of carrier operations that flow from the creation of a unified rail system, as this Court recognized over 50 years ago in *Lowden*, 308 U.S. at 233, when it upheld the Commission's authority to impose conditions protecting the income of affected employees:

> It is thus apparent that the steps involved in carrying out the Congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and its harsh consequences may so seriously affect employee morale as to require their mitigation both in the interest of the successful prosecution of the Congressional policy of consolidation and of the efficient operation of the



> industry itself. . . .[10]

Accordingly, the Commission has repeatedly ruled that, in approving a § 11343 control application, it grants a carrier full authority to establish an operationally consolidated rail system. *See Seaboard Coast Line R.R.—Investigation of Control & Modification of Traffic Conditions*, 360 I.C.C. 582, 592 (1979); *Peoria & E. Ry. Stockholders* v. *New York Cent. R.R.*, 334 I.C.C. 131, 151 (1968). As the Commission explained most recently in *CSX Corp.—Control—Chessie Sys. & Seaboard Coast Line Indus.*, Finance Docket No. 28905 (Sub-No. 23) (served Oct. 3, 1989), slip op. at 4 (emphasis added):

> We [have] rejected the argument that the immunity from the operation of other laws under section 11341(a) extends only to matters specifically mentioned by us in approving the transaction. Rather, the *immunity covers the future coordinations and public benefits expected to flow from the control transaction that we approved, and our approval of the principal transaction extends also to these directly related actions.*[11]

---

[10] The Commission's regulations similarly reflect the breadth of the "transaction" that the Commission must scrutinize in a § 11343 consolidation proceeding. While applicant carriers are required to provide information about the financial aspects of their proposed arrangement, *see* 49 C.F.R. § 1180.9 (1989), they must also provide detailed analyses showing the impact of the proposed "transaction" on inter-and intramodal competition for freight surface transportation in affected regions (49 C.F.R. § 1180.7) and operational data including a summary of proposed operating plan changes. 49 C.F.R. § 1180.8. In addition, carriers are required to submit supporting information concerning the effect of the proposed "transaction" upon their employees during the initial three-year period after consolidation. 49 C.F.R. § 1180.6(a) (2) (v). None of these materials would have any relevance if the "transaction" under scrutiny consisted only of the carriers' financial arrangements.

[11] The Union Respondents note at pp. 3 of their brief that, at the time it filed its control application with the Commission, CSX Corporation filed several additional applications for permission to accomplish specified operational changes. The Unions imply that these separate applications were required because the control application only authorized the financial consolidation of the carriers. However, the ICA requires that carriers obtain additional express ICC approval to engage in certain types of operational changes (*e.g.*, joint use of tracks and line abandonments), even when done in connection with a consolidation. *See CSX Corp.—Control—Chessie Sys. & Seaboard Coast Line Indus.*, 363 I.C.C. 521, 535 (1980) ("To coordinate the operations of the two systems, applicants have proposed various operational changes. Some of these proposed changes require separate applications.").

Thus, the "transaction" before the Commission in *CSX—Control* involved far more than the mere conversion of Chessie and Seaboard common stock into CSX Corporation common stock. The Commission authorized the operational coordination of two rail systems (363 I.C.C. at 535), one that would have an overall beneficial impact upon transportation services (*id.* at 552) because of the "many projects intended to coordinate the Chessie and Family Lines systems to achieve the goal of overall profitability." *Id.* at 553. The Commission recognized that the applicant carriers "have the potential to generate significant cost reductions and improved utilization of physical assets" through various projects, including mechanical department coordinations. *Id.* at 556. In granting its approval, the Commission authorized the creation of a single rail "system." *Id.* at 533, 535.

CSXT's Waycross/Raceland shop consolidation clearly fell within the authority conferred in *CSX—Control*, as the Commission held below. The consolidation of these mechanical department shops is precisely the sort of operational change one would expect to flow from a carrier unification, as the carriers seek to eliminate redundant facilities and rid themselves of excess capacity, thereby achieving substantial operational efficiencies. Indeed, elimination of excess capacity at Raceland was presented by the carriers to the Commission as one of the benefits to be achieved by the consolidation in *CSX—Control*. *See* 363 I.C.C. at 561. Accordingly, this shop consolidation plainly fell within the § 11341(a) immunity conferred in *CSX—Control*.

## III. The Legislative History of the ICA's Immunity Provisions Establishes that Congress Intended to Encompass Obligations Arising from Rail Collective Bargaining Agreements.

Congress' intent to immunize rail consolidations from obligations in collective bargaining agreements is further demonstrated by the ICA's legislative history. In particular, Congress did not adopt language that would have excluded such agreements and RLA bargaining obligations from the reach of the permanent ICA immunity provisions in Title II of ERTA. Congress did, however, at the same time expressly except such obligations from the immunity conferred in the temporary provisions of ERTA Title I. Congress' rejection of the Harrington Amendment in 1940 further shows its intent that obligations flowing from collective bargaining agreements not stand in the



way of the achievement of consolidations found to be in the public interest. Instead, Congress determined that rail employees affected by consolidations and mergers be provided with protection from income losses resulting from such transactions.

The Union Respondents do not dispute the breadth of the language used by Congress in enacting the ICA immunity provisions in the Transportation Act of 1920.[12] Nor, contrary to the court below, do they purport to find support for a limited construction of § 11341(a) in the enactment of the RLA in 1926. Instead, the Unions argue that the distinctions drawn by Congress in 1933 between the temporary and permanent provisions of ERTA should be disregarded because Congress had granted "broader jurisdiction" to the Federal Coordinator than it had the ICC with respect to rail consolidations. "The Coordinator's jurisdiction . . . ran to all matters which could permit railroads to operate more economically and he had explicit authority to *require* carriers to take certain actions." Union Resp. Brief at 38; emphasis added. In fact, however, the distinction they suggest is an erroneous one.

While Congress did vest greater authority in the Coordinator than the Commission to compel certain railroad actions, it did not grant the Coordinator any greater authority than the Commission over rail consolidations. In § 5 of ERTA, 48 Stat. 213, Congress authorized the Coordinator to issue binding orders to carriers to achieve the purposes specified in ERTA § 4(1).[13]

---

[12] The Unions merely argue that, because Congress enacted general provisions dealing with rail labor relations in Title III of the 1920 Act, separate from the amendments to the ICA that were found in Title IV of the act, "it must be presumed that the ICC's exclusive authority over consolidations did not include jurisdiction over labor relations matters." Union Resp. Brief at 36. The correct interpretation is that Congress intended the newly established Labor Board to have jurisdiction with respect to rail labor matters generally but that rail carriers would be relieved of any such obligations "in so far as may be necessary to enable them to do anything authorized or required by any order" of the ICC. ICA § 5 (8), as added by § 407 of the Transportation Act of 1920, 41 Stat. 480; Pet. App. 118a.

[13] Thus, the Coordinator was empowered to order carriers to "avoid unnecessary duplication of services and facilities," to "permit the joint use of terminals," to "control allowances, accessorial services and the charges therefor," and to "avoid other wastes and preventable expense." ERTA §§ 4(1) (a)-(c), 5; 48 Stat. 212-13.

It did not grant similar authority to the Coordinator to order the "reorganization of carriers", the purpose set forth in ERTA § 4(2). *See also St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298, 317 (1954) (temporary provisions of ERTA, like the permanent ICA, contained no provision for "compulsory consolidation").[14] Accordingly, Congress' express exclusion of collective bargaining agreements and RLA obligations from the temporary immunity conferred on carriers complying with orders of the Coordinator in ERTA Title I, § 10(a), 48 Stat. 215 (Pet. App. 118a), stands in marked contrast to the absence of such an exclusion in the revised permanent immunity provisions of ICA § 5(15) governing rail consolidations, adopted in ERTA Title II, § 202, 48 Stat. 217-19 (Pet. App. 119a).[15] Had Congress intended the general ICA immunity accorded consolidating carriers to be so limited, it clearly knew how to make such an intention clear.

Union Respondents would similarly have this Court ignore Congress' rejection of the Harrington Amendment in 1940,[16] which, had it been adopted, would have prevented the ICC from approving any consolidation that would result in "the impairment of existing employment rights." 84 Cong. Rec. 9882 (1939). They argue that the amendment was not "rejected" but was merely "modified" and "incorporated as the second sentence of section 5(2)(f)." Union Resp. Brief at 39 n.55. This Court has already remarked on the significance of Congress' refusal to adopt the Harrington Amendment in *Railway Labor Exec's' Ass'n* v. *United States*, 339 U.S. 142, 151 (1950): "This amend-

[14] Although Congress enacted special protections for employees affected by Coordinator activities in Title I, § 7 (48 Stat. 213-14), it did not grant the Coordinator any broader jurisdiction than the Commission with respect to "labor relations matters", contrary to Union Respondents' unsupported assertion at page 38 of their brief.

[15] This Court similarly observed in *Texas* v. *United States*, 292 U.S. 522, 534 (1934), that the express protection given carrier contractual obligations with respect to the location of offices, shops, and roundhouses, located in ERTA Title I, § 11 (48 Stat. 215), stood in marked contrast to the absence of such a provision in the permanent ICA enactments in ERTA Title II and "indicate[s] an intentional distinction."

[16] The Union Respondents completely ignore the fact that Congress in 1940 did not adopt another proposal modelled after ERTA Title I that would have amended the ICA immunity provisions to except collective bargaining agreements and RLA obligations. *See* CSXT Brief at 43-44 & n.44.



ment . . . threatened to prevent all consolidations to which it related." If the RLA and collective bargaining agreements already prevented an impairment of employee rights, as the Union Respondents assert here, the Harrington Amendment would have been unnecessary. Congress rejected the proposal to preserve all "employment rights" of affected employees and instead granted them unparalleled statutory compensation protections. *Brotherhood of Maint. of Way Employees* v. *United States*, 366 U.S. 169, 177-78 (1961). At the same time Congress reenacted the broad immunity provisions of the ICA, then located in ICA § 5(11) (Pet. App. 119a-120a), without any exception for collective bargaining agreements or other RLA obligations so that rail consolidations found to be in the public interest could proceed.

Finally, the Unions purport to find support for their position in the amendments to the ICA contained in the 4R Act[17] and in the passage of the Staggers Rail Act of 1980.[18] Union Resp. Brief at 45-47. Neither act modified the ICA immunity provisions, and there is no legislative history to suggest that Congress intended any such result.[19] Indeed, both statutes had as their fundamental goal the fostering and encouragement of rail consolidations and related transactions. *See* S. Rep. No. 499, 94th Cong., 1st Sess. 20 (1975); *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Exec's' Ass'n*, 109 S. Ct. 2584, 2596-97 (1989). The amendments to the labor protection provisions of the ICA (then § 5(2)(f), now § 11347) contained in the 4R Act increased the income protections afforded affected employees (raising the period of income protection from four years to six) and codified the obligation of consolidating carriers to reach implementing agreements with the unions representing such employees in carrying out ICC-approved transactions. *See* Union Resp. Brief at 45-46. But nothing contained in those amendments limited the scope of the immunity provisions of the ICA.

[17] Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31.

[18] Pub. L. No. 96-448, 94 Stat. 1895.

[19] The amendments to ICA § 5(2)(f) were last-minute additions to the 4R Act, without any legislative history. *Railway Labor Exec's' Ass'n* v. *United States*, 675 F.2d 1248, 1254-55 (D.C. Cir. 1982); *New York Dock Ry.* v. *United States*, 609 F.2d 83, 93 (2d Cir. 1979).

RLEA's claim that Congress intended in the 4R Act to provide that ICC-approved rail consolidations may be implemented only after compliance with the open-ended RLA bargaining procedures is completely unsupported by either precedent or logic. No court has accepted such an argument, and federal courts have continued to uphold the primacy of the ICA over the RLA in decisions since the 4R Act's passage. *Burlington N. R.R.* v. *United Transp. Union*, 848 F.2d 856, 863 (8th Cir.), *cert. denied*, 109 S. Ct. 499 (1988); *Brotherhood of Loc. Eng'rs* v. *Boston & Maine Corp.*, 788 F.2d 794, 800 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986); *see also ICC* v. *Brotherhood of Loc. Eng'rs*, 482 U.S. 270, 287 (1987) (Stevens, J., joined by Brennan, Marshall, and Blackmun, J.J., concurring). The Commission has also consistently rejected the notion that Congress intended any such result in the 4R Act. *See Denver & R. G. W. R.R.— Trackage Rights—Missouri Pac. R.R.—Between Pueblo, Co. and Kansas City, Mo.*, Finance Docket No. 30,000 (Sub-No. 18) (served Oct. 25, 1983), slip op. at 5 ("[T]he 4-R Act did not limit our authority to exempt a transaction from the RLA.")[20]; *St. Louis Southwestern Ry.—Trackage Rights*, 1 I.C.C. 2d 776, 781 (1984) ("The 4R Act did not limit our authority to preempt other laws in authorizing a transaction; it simply specified standards for the minimum level of employee protection . . . .").

In sum, the Unions' contention that Congress in the 4R Act intended *sub silentio* to elevate RLA rights to the primacy they claim is inherently incredible in view of Congress' expressed intent in 1976 to foster and encourage rail mergers. This argument, if true, would mean that Congress adopted without any discussion a provision virtually identical in effect to the Harrington Amendment that it had expressly rejected 36 years earlier – a provision, if it had been enacted, that would have "prevent[ed] all consolidations to which it related". *Railway Labor Exec's' Ass'n* v. *United States*, 339 U.S. 142, 151 (1950).[21]

Lacking any legislative history supporting their interpretation of the immunity provisions, the Union Respondents argue

---

[20] *Vacated and remanded sub nom. Brotherhood of Loc. Eng'rs* v. *ICC*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd*, 482 U.S. 270 (1987).

[21] Like the 4R Act, nothing in the Staggers Rail Act of 1980 even purported to effect the ICA immunity provisions.



that the ICC has not always consistently interpreted the reach of § 11341(a) and its predecessors and adopted its current interpretation only in 1983. Even if that argument were true, the language, legislative history, and policies underlying the ICA establish the correctness of the Commission's contemporary understanding.

In *Norfolk & W. Ry.—Merger*, 347 I.C.C. 506, 511-12 (1974), the Commission squarely articulated its authority to set aside agreements negotiated under the RLA. The Railway Labor Executives' Association ("RLEA") (represented by counsel for the Union Respondents here) argued that an RLA agreement could only be changed in accordance with the RLA's bargaining procedures and that the ICC lacked the authority to suspend its provisions. The Commission disagreed:

> . . . RLEA's assertion that the agreement and the wage, rules, and working conditions governed by the Railway Labor Act may not be changed except in accordance with the procedures prescribed by that act is squarely refuted by the language of section 5(11) of the Interstate Commerce Act which confers exclusive and plenary jurisdiction upon this Commission to approve mergers and relieves carriers from all other restraints of Federal law. The Railway Labor Act is a Federal act and is thereby preempted by section 5(11). Thus, the Commission may relieve the railroad from the requirements of that act insofar as is necessary to carry into effect the transaction approved pursuant to section 5(2).

More recent ICC decisions, following the passage of the 4R Act, have confirmed the Commission's interpretation of the reach of the ICA immunity language as it relates to the RLA and rail collective bargaining agreements. *See* p. 14, *supra; see also Delaware & Hudson Ry.—Lease and Trackage Rights Exemption*,

1989 ICC LEXIS 9, *8 (1989).[22]

Finally, Union Respondents argue at pages 27-28 of their brief that statements made by Graham Claytor in connection with the enactment of the Regional Rail Reorganization Act of 1973 ("3R Act") and the willingness of some railroads to enter into "lifetime" labor protection agreements, such as CSXT's Orange Book, demonstrate that the carriers must have understood that they could not obtain the right to transfer work and employees across corporate boundaries through consolidation proceedings under the ICA.

The Unions have presented absolutely no evidence to support their speculation. In fact, carrier support for generous labor protection provisions in the 3R Act was far more likely to have resulted from the fact that a substantial portion of the cost was to be paid by the U.S. Treasury.[23] In addition, virtually all of the employees entitled to the lifetime income benefits of the 3R Act already enjoyed lifetime protection from other sources. *Hearings on S. 2188 and H.R. 9142 Before the Surface Transportation Subcomm. of the Senate Comm. on Commerce*, 93d Cong., 1st Sess., 969 (1973) ("1973 Hearings"). Moreover, in exchange for the generous protective benefits, the 3R Act

---

[22] In addition, the Commission has long declared that it has the authority under the immunity provisions to set aside non-labor contract terms where necessary to carry out a rail consolidation. *See Missouri Pac. R.R.—Merger*, 348 I.C.C. 414, 430 (1976), *rev'd sub nom. City of Palestine* v. *United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

Union Respondents cite the Commission's decision in *Gulf, M. & O. R.R.—Abandonment*, 282 I.C.C. 311 (1952), for the proposition that the Commission has held that the ICA immunity provisions are "not applicable to private contracts." Union Resp. Brief at 21 n.37. In fact, however, as CSXT demonstrated at pages 28-29 n.32 of its brief, the Commission in *Gulf* expressly recognized that it does have the power to abrogate contract terms in a transaction, unlike that before it, to which the immunity provisions now found in § 11341(a) are applicable. *See* 282 I.C.C. at 335.

[23] *See* 1973 U.S. Code Cong. & Admin. News 1146; *see also id.* at 3295 (letter from Secretary of Transportation commenting on employee protection provisions of the labor/management agreement that underlay the 3R Act: "Using the taxpayers' money, they have negotiated some unprecedented provisions which do not assure the new system of labor costs that will permit it to survive, but which do impose an excessive burden on the taxpayer.").



authorized Conrail to move work *anywhere* within its system, including between points within a single predecessor railroad, and not merely to locations across former corporate boundaries. Thus, Conrail obtained the right to move work and employees without having to establish that such actions were part of the creation of the consolidated system, as would be the case in an ICC consolidation.[24]

Finally, the carriers' willingness to pay rail labor's "price" was essential to remove labor objections to the proposed legislation. 1973 Hearings at 969 (Claytor testimony).[25]

Accordingly, the legislative history of the ICA demonstrates Congress' intent to include collective bargaining agreement obligations within the reach of the § 11341(a) immunity provisions.

---

[24] *See* 3R Act § 503, reprinted in 1973 U.S. Code Cong. & Admin. News 1138; Conf. Rep. No. 93-744, reprinted in 1973 U.S. Code Cong. & Admin. News 3335; emphasis added:

> The Corporation was granted the right to assign, allocate, reassign, reallocate, and consolidate work formerly performed on rail properties conveyed to it from a railroad in reorganization *to any location, facility, or position on its system*. . . .

[25] Similar considerations led CSXT's predecessors to agree to lifetime income protections in the Orange Book agreement. The Orange Book was entered into by the carriers in order to settle rail labor's involvement in lengthy litigation challenging the Commission's approval of the consolidation of the Atlantic Coast Line and Seaboard Air Line Railroads. *See Florida E. C. Ry.* v. *United States*, 259 F. Supp. 993 (M.D. Fla. 1966), *appeal of RLEA dism'd as moot*, 386 U.S. 544 (1967). Thus, rail labor was able to obtain the Orange Book protections not because the carriers had any doubts concerning the Commission's power to immunize the transaction from the RLA, but because the unions had succeeded in delaying the consolidation through post-ICC court proceedings. In addition, the carriers, like Conrail, also obtained in the Orange Book the valuable right to move work and employees not only across previous corporate boundaries but also anywhere within each of the formerly separate ACL and SAL rail systems. It should be noted that the Waycross/Raceland coordination does not threaten or seek to abrogate the lifetime income protections bestowed by the Orange Book.

## IV. ICC's Interpretation of the Scope of the ICA Immunity Provisions Does Not Result in a Fifth Amendment Violation.

Union Respondents suggestion at pp. 47-50 of their brief that Petitioner's interpretation of § 11341(a) would result in a violation of the Fifth Amendment also has no merit.[26] It is not disputed that contract rights may in certain instances be entitled to Fifth Amendment protections. But this Court has long ruled that private contracts that deal with a subject matter appropriately regulated by the federal government under the commerce power may be nullified without violating the Fifth Amendment. *See, e.g., Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 222-28 (1986); *Norman* v. *Baltimore & O. R.R.*, 294 U.S. 240, 307-11 (1935); *Louisville & N. R.R.* v. *Mottley*, 219 U.S. 467, 482 (1911). Congress plainly may nullify a contractual provision by adjusting the benefits and burdens of economic life to promote the common good without requiring government compensation. *Connolly*, 475 U.S. at 224-25.[27]

The federal courts have routinely rejected Fifth Amendment claims by rail labor and employers alike based on the alleged impact of federal legislation on collective bargaining agreements and labor protection agreements. *See Wilson* v. *New*, 243 U.S. 332, 353 (1917); *Railway Labor Exec's' Ass'n* v. *United States*, 575 F. Supp. 1554, 1558-59 (Sp. Ct. RRRA 1983), *cert. denied*, 465 U.S. 1101 (1984); *United Transp. Union* v. *Consolidated Rail Corp.*, 535 F. Supp. 697, 706-08 (Sp. Ct. RRRA) (Friendly, J.), *cert. denied*, 457 U.S. 1133 (1982). *Cf. Chang* v. *United States*, 859 F.2d 893, 894-98 (Fed. Cir. 1988) (invalidation of private

---

[26] This issue was not reached or decided by the Court of Appeals. Pet. App. 26a.

[27] The Unions purport to see a distinction between Congress' power to make a contract "unenforceable" and its authority to "relieve" one party of a contractual obligation. Union Resp. Brief at 48. They cite no supporting authority. The effect of the ICA in this case, in relieving CSXT from certain contractual obligations to its employees, is no different from the ICA's nullification of the lifetime pass rights of Erasmus L. Mottley and his wife, upheld by this Court 80 years ago in *Louisville & N. R.R., supra*.



employment contracts by executive orders did not constitute a taking).[28] The alleged infringement of BRC's members' contract rights by the ICC, in furtherance of a rail consolidation found to be in the public interest, is similarly not of constitutional magnitude.[29]

---

[28] Union Respondents cite *Central New England Ry.* v. *Boston & Albany R.R.*, 279 U.S. 415 (1929), at page 50 of their brief for the proposition that the ICA "has never been read" to have a destructive effect on a third party's contract rights. *Central New England* did not so hold; indeed, the Court expressly declined to reach this issue. *See* 279 U.S. at 419-20. But, the Court did cite approvingly its prior decisions in *Colorado* v. *United States*, 271 U.S. 153 (1926), and *New York* v. *United States*, 257 U.S. 591 (1922), discussed in CSXT's brief at 17 n.22. In each of those cases, the Court saw no constitutional infirmity in overriding provisions in state rail charters as necessary to carry out ICC orders. *See* 271 U.S. at 165; 257 U.S. at 601.

*Regents of the Univ. Sys. of Ga.* v. *Carroll*, 338 U.S. 586 (1950), cited at page 49 n.61 of the Unions' brief, deals with the statutory authority of the FCC and, hence, is wholly irrelevant here.

[29] Any interference with BRC's members' contract rights is *de minimis* at best. The only effect of the Commission's decision on Orange Book agreement rights is that employees protected thereunder, who could already be reassigned by CSXT anywhere on the expansive SCL system, can now be reassigned to *one* additional location, Raceland, Kentucky, with their moving and other related home removal losses paid under Art. I, §§ 9 and 12 of the ICC's *New York Dock* Conditions. None of the remaining portions of the Orange Book, including its lifetime income protections, was affected. The *de minimis* impact on BRC's alleged contract rights is more than justly compensated by the generous income protections and moving cost and home sale loss reimbursement provisions in the Commission's *New York Dock* Conditions.

## CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

JAMES S. WHITEHEAD
*(Counsel of Record)*
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7703

NICHOLAS S. YOVANOVIC
JAMES D. TOMOLA
CSX TRANSPORTATION, INC.
500 Water Street
Jacksonville, Florida 32202

*Attorneys for Petitioner*
*CSX TRANSPORTATION, INC.*

November 23, 1990

(19) (20)

Nos. 89-1027 and 89-1028

FILED
DEC 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

---

NORFOLK & WESTERN RAILWAY COMPANY and SOUTHERN RAILWAY COMPANY,
*Petitioners,*

v.

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, *et al.*,
*Respondents.*

---

CSX TRANSPORTATION, INC.,
*Petitioner,*

v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
*Respondents.*

---

**On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## MOTION OF UNION RESPONDENTS FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF

---

WILLIAM G. MAHONEY
(Counsel of Record)
JOHN O'B. CLARKE, JR.
HIGHSAW, MAHONEY
& CLARKE, P.C.
Suite 210
1050 - 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500
*Attorneys for Union Respondents American Train Dispatchers' Association and Brotherhood of Railway Carmen, et al.*

December 5, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

---

No. 89-1027

NORFOLK & WESTERN RAILWAY COMPANY and
SOUTHERN RAILWAY COMPANY,
*Petitioners,*

v.

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, *et al.*,
*Respondents.*

---

No. 89-1028

CSX TRANSPORTATION, INC.,
*Petitioner,*

v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
*Respondents.*

---

**On Writs of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

---

## MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Comes now the Union Respondents in the above-designated cases and, pursuant to Rules 25.5 and 25.6 of the Rules of this Court, respectfully request this Court to accept the Supplemental Brief included herein. As shown by the accompanying Supplemental Brief, it is

being submitted to bring to this Court's attention an intervening matter, *viz*, the filing with the United States Court of Appeals for the District of Columbia Circuit of a petition to review the decision by the respondent Interstate Commerce Commission on remand from the judgment by the Court of Appeals which is currently before this Court for review on writs of certiorari. This Supplemental Brief could not have been filed before this case was called for oral argument because the filing of the petition to review did not occur until the day after this case was argued before this Court. This petition, the Union Respondents respectfully submit, is relevant to the exercise of this Court's discretionary jurisdiction over the case at bar.

Respectfully submitted,

WILLIAM G. MAHONEY
(Counsel of Record)
JOHN O'B. CLARKE, JR.

HIGHSAW, MAHONEY
& CLARKE, P.C.
Suite 210
1050 - 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

*Attorneys for Union Respondents American Train Dispatchers' Association and Brotherhood of Railway Carmen, et al.*

December 5, 1990

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1990

---

No. 89-1027

NORFOLK & WESTERN RAILWAY COMPANY and
SOUTHERN RAILWAY COMPANY,
*Petitioners,*
v.
AMERICAN TRAIN DISPATCHERS' ASSOCIATION, *et al.*,
*Respondents.*

---

No. 89-1028

CSX TRANSPORTATION, INC.,
*Petitioner,*
v.
BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
*Respondents.*

---

**On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## SUPPLEMENTAL BRIEF

---

During the course of the oral argument held before the Court in these cases on December 3, 1990, questions were raised as to the scope of the issues before the Court in its consideration of the authority of the Interstate Commerce Commission ("ICC" or "Commission") under 49 U.S.C. § 11341(a) and the possible limitations imposed by 49 U.S.C. § 11347 upon 49 U.S.C. § 11341(a).

The purpose of this supplemental brief is to inform the Court that on December 4, 1990, the Union Respondents filed under 28 U.S.C. §§ 2321(a) and 2341, *et seq.*, a petition to review the decisions of the ICC following remand to it from the court of appeals by the decisions and orders of that court now under review before this Court in Nos. 89-1027 and 89-1028. That petition has been designated as Case No. 90-1586 by that court.

The petition requests the court of appeals to decide three issues not reached in its decision in the cases pending before this Court, *viz*, whether 49 U.S.C. § 11341(a) authorizes the ICC to foreclose employees' right to resort to Railway Labor Act procedures to protect their contract rights; whether 49 U.S.C. § 11347 authorizes the ICC to compel employees to arbitrate changes in collective bargaining agreements; and whether the abrogation of employee contractual rights and railroad contractual obligations would amount to the improper and uncompensated confiscation of property in contravention of the guarantees of the Due Process and Just Compensation clauses of the Fifth Amendment to the Constitution of the United States.

Respectfully submitted,

WILLIAM G. MAHONEY
(Counsel of Record)
JOHN O'B. CLARKE, JR.

HIGHSAW, MAHONEY
& CLARKE, P.C.
Suite 210
1050 - 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

*Attorneys for Union Respondents American Train Dispatchers' Association and Brotherhood of Railway Carmen, et al.*

December 5, 1990

(9) (10)

Nos. 89-1027 and 89-1028

Supreme Court, U.S.
FILED
MAY 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

---

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
*Petitioners,*

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
*Respondents.*

---

CSX TRANSPORTATION, INC.,
*Petitioner,*

v.

BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
*Respondents.*

---

**On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

---

RICHARD T. CONWAY
(Counsel of Record)
RALPH J. MOORE, JR.
D. EUGENIA LANGAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
Vice Chairman and
General Counsel
National Railway
Labor Conference
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7200

*Attorneys for the National Railway Labor Conference as Amicus Curiae*

May 25, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

## TABLE OF CONTENTS


| | Page |
|---|---|
| STATEMENT OF THE CASE | 1 |
| INTEREST OF AMICUS CURIAE | 5 |
| SUMMARY OF ARGUMENT | 8 |
| ARGUMENT | 8 |
| CONCLUSION | 13 |

## TABLE OF AUTHORITIES


*Cases:* Page

*Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972) ..... 9

*Broth. of Loco. Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794 (1st Cir. 1986), *cert. denied*, 479 U.S. 829 (1986) ..... 11

*Brotherhood of Locomotive Engineers* v. *I.C.C.*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd on other grounds*, 482 U.S. 270 (1987) ..... 10

*Brotherhood of Loc. Eng.* v. *Chicago & North Western Ry. Co.*, 314 F.2d 424 (8th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963) ..... 12

*Brotherhood of Ry. Carmen* v. *I.C.C.*, 880 F.2d 562 (D.C. Cir. 1989) ..... 4, 5

*Brotherhood Ry. Carmen* v. *CSX Transp., Inc.*, 855 F.2d 745 (11th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3543 (1989) ..... 3

*Bundy* v. *Penn Central Co.*, 455 F.2d 277 (6th Cir. 1972) ..... 11

*Burlington Northern, Inc.* v. *American Ry. Super. Ass'n*, 503 F.2d 58 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975) ..... 11

*Burlington Northern* v. *Maintenance Employes*, 481 U.S. 429 (1987) ..... 7, 8

*California* v. *American Stores Company*, 58 U.S. L.W. 4529 (1990) ..... 9

*California* v. *Taylor*, 353 U.S. 553 (1957) ..... 10

*CSX Corp.—Control—Chessie and Seaboard C.L.I.*, 4 I.C.C.2d 641 (1988) ..... 3, 7

*Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711 (1945), on rehearing, 327 U.S. 661 (1946) ..... 9

*Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938) ..... 9

*Hodge* v. *Evans Financial Corp.*, 707 F.2d 1566 (D.C. Cir. 1983) ..... 10

*ICC* v. *Locomotive Engineers*, 482 U.S. 270 (1987) .. 11, 12

*International Broth. of Elec. Workers* v. *I.C.C.*, 862 F.2d 330 (D.C. Cir. 1988) ..... 3

*Kaiser Aluminum & Chemical Corporation* v. *Bonjorno*, 58 U.S.L.W. 4421 (1990) ..... 11




## TABLE OF AUTHORITIES—Continued


Page

*Martin* v. *Equitable Life Assur. Soc. of U.S.*, 553 F.2d 573 (8th Cir. 1977) ..... 10

*Missouri Pacific R. Co.* v. *United Transp. Union*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987) ..... 11

*Nemitz* v. *Norfolk and Western Railway Co.*, 436 F.2d 841 (6th Cir. 1971), *aff'd*, 404 U.S. 37 (1971) ..... 11-12

*New York Dock Ry.—Control—Brooklyn E. Dist. Terminal*, 360 I.C.C. 60 (1979), *aff'd sub nom., New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979) ..... 2

*Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369 (1969) ..... 7, 8

*Ry. Labor Executives* v. *Guilford Transp. Indus.*, 667 F. Supp. 29 (D. Me. 1987), *aff'd* (table), 843 F.2d 1383 (1st Cir. 1988), *cert. denied*, 57 U.S.L.W. 3839 (1989) ..... 12

*Schwabacher* v. *United States*, 334 U.S. 182 (1948) ..... 10-11

*Shore Line* v. *Transportation Union*, 396 U.S. 142 (1969) ..... 7, 9

*Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911) ..... 9

*Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959) ..... 10

*Texas & N.O. Ry.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963) ..... 12

*United Transp. Union* v. *Norfolk and Western R. Co.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988) ..... 3

*United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911) ..... 9

*United States* v. *Lowden*, 308 U.S. 225 (1939) ..... 5

*Statutes:*

Interstate Commerce Act, 49 U.S.C.:

§ 11341(a) ..... *passim*

§ 11343 ..... 1, 2, 8

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| § 11344 | 2 |
| § 11347 | 2 |
| Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* | *passim* |
| *Miscellaneous:* | |
| Burgoon, *Mediation under the Railway Labor Act,* included in *The Railway Labor Act at Fifty* (GPO, 1977) | 10 |
| *Seniority Practices—Railroad Operating Employees and Other Industries,* App. Vol. III to Report of the Presidential Railroad Commission (1962) | 6 |
| 17A C.J.S., Contracts, § 398 | 10 |


IN THE
# Supreme Court of the United States
OCTOBER TERM, 1989

Nos. 89-1027 and 89-1028

NORFOLK AND WESTERN RAILWAY COMPANY, *et al.*,
*Petitioners,*
v.
AMERICAN TRAIN DISPATCHERS ASSOCIATION, *et al.*,
*Respondents.*

CSX TRANSPORTATION, INC.,
*Petitioner,*
v.
BROTHERHOOD OF RAILWAY CARMEN, *et al.*,
*Respondents.*

**On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

This *amicus* brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 37.3.

## STATEMENT OF THE CASE

Under § 11343 of the Interstate Commerce Act ("ICA"), mergers, consolidations, and other acquisitions of control involving two or more rail carriers (hereinafter generally referred to as "consolidations") "may be carried out only with the approval and authorization of

the" Interstate Commerce Commission ("ICC" or "Commission"). 49 U.S.C. § 11343. Under § 11344, when considering such a proposed transaction, the ICC must balance a number of factors, including "the interest of carrier employees affected by the proposed transaction," and "shall approve and authorize" the transaction if "consistent with the public interest." 49 U.S.C. § 11344. And, under § 11347, the ICC in approving such a transaction "shall require" a rail carrier involved in the transaction "to provide a fair arrangement . . . protective of the interests of employees" as is discussed more fully below. 49 U.S.C. § 11347. Section 11341(a) provides that the ICC's "authority" under those provisions "is exclusive," and that each participant in an approved transaction "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction . . . ." 49 U.S.C. § 11341(a).

The basic issue in these cases is whether that exemption from "all other law" applies to provisions of collective bargaining agreements, otherwise enforceable under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, that if enforced would impede the "carrying out" of an approved transaction. That issue arises out of applications of employee protection arrangements, imposed by the ICC upon petitioners under § 11347 of the ICA in approving acquisitions of control over the components of what are now the CSX and the Norfolk Southern rail systems.

In each case, the ICC imposed the so-called *New York Dock* employee protections that it normally imposes in approving consolidations.[1] In general, an employee adversely affected by implementation of the transaction is assured of compensation comparable to that received

[1] See *New York Dock Ry.—Control—Brooklyn E. Dist. Terminal*, 360 I.C.C. 60 (1979), *aff'd sub nom., New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).



prior thereto for up to six years thereafter, indexed in accordance with general wage increases. An employee required to move is reimbursed for moving expenses and for loss incurred in the sale of home or cancellation of a lease. See 360 I.C.C. at 84-90. The carrier's *quid pro quo* is that it may rearrange work and employee forces, pursuant to an implementing agreement or arbitration award under Art. I, § 4, even if that would not be permissible under collective bargaining agreements. The carrier must give advance notice of a contemplated implementation that "may cause the dismissal or displacement of any employees, or rearrangement of forces . . ."; the carrier and employee representatives negotiate upon an implementing agreement that "shall provide for the selection of forces from all employees involved on a basis . . . appropriate for application in the particular case . . ."; and, if no agreement is reached, either may submit the matter to arbitration. The contemplated change in "operations, services, facilities, or equipment" cannot take place until after such implementing agreement or arbitration award is had, and "any assignment of employees made necessary" as a result "shall be made on the basis" provided therein. See 360 I.C.C. at 85.

In these cases, the ICC upheld (with some revision in one case) arbitration awards under Art. I, § 4, of *New York Dock*.[2] The ICC concluded that the proposed implementations were a carrying out of the transactions it approved; and that such implementations appropriately may include both transfers of work and transfers of employees even if inconsistent with a collective bargaining agreement or the RLA. See *CSX Corp.—Control—*

[2] The ICC has exclusive jurisdiction to review arbitration awards under employee protection arrangements it imposes. See, *e.g.*, *Brotherhood Ry. Carmen* v. *CSX Transp., Inc.*, 855 F.2d 745, 748-749 (11th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3543 (1989); *International Broth. of Elec. Workers* v. *I.C.C.*, 862 F.2d 330 (D.C. Cir. 1988); *United Transp. Union* v. *Norfolk and Western R. Co.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988).

*Chessie and Seaboard C.L.I.*, 4 I.C.C.2d 641, 648-650 (1988). As stated by the Commission in its unpublished opinion regarding the Norfolk Southern coordination:

> ". . . [T]here can be no assurance that post-consummation coordinations contemplated as part of the transaction [approved by the ICC] could ever be accomplished if RLA dispute resolution mechanisms were followed. Thus, the [arbitration] panel correctly found . . . that terms of the Commission's order, and specifically the compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based upon existing collective bargaining agreements. . . . Moreover, an action taken under our control authorization is immunized from conflicting laws by section 11341(a) [of the ICA]. . . . The proposed transfer . . . is one of the future coordinations and public benefits expected to flow from, and is therefore part of, the control transaction that we approved." Pet. in No. 89-1027 at 35a (citations omitted).

The Court of Appeals reversed because, in its view, § 11341(a) of the ICA "does not grant the ICC its claimed power to override provisions of a" collective bargaining agreement. *Brotherhood of Ry. Carmen* v. *I.C.C.*, 880 F.2d 562, 574 (D.C. Cir. 1989). In exempting the carrying out of approved transactions from "the anti-trust laws and from all other law," § 11341(a) does not "say that the ICC may also override contracts" (*id.* at 567); and "Congress focused nearly exclusively, in the hearings and debates . . ., on specific types of laws it intended to eliminate—all of which were positive enactments, not common law rules of liability, as on a contract" (*id.* at 570).

The court below declined to consider whether that "immunity provision . . . may operate to override provisions of the RLA" (*id.* at 570), since, among other things, in "light of our holding that § 11341(a) does not



empower the ICC to override a [collective bargaining agreement], it is unclear what are the consequences, if any, of its rulings that the carriers need not comply with the RLA" (*id.* at 572). Thus, it remanded the cases to the ICC "to determine whether there is any live RLA issue remaining" (*id.* at 573); and, also, to reconsider its "theory that the labor protective conditions required by § 11347 of the Act are exclusive," and "its related assertion . . . that § 4 [Art. I] of the *New York Dock* conditions gives the arbitration committee the 'absolute right' to effectuate the transfer of employees, and to override any contrary provision of a" collective bargaining agreement (*ibid.*).

## INTEREST OF AMICUS CURIAE

The National Railway Labor Conference ("NRLC") is an unincorporated association which includes most of the nation's major railroads (including petitioners) among its members. The NRLC represents members in multi-employer collective bargaining under the RLA and with respect to other labor relations issues of general concern to the railroad industry, including those arising in litigation before the courts.

As we shall show in our Argument, the Congress since 1920 has encouraged railroad consolidations to further the public interest in more economical and efficient rail service. Most of the major railroad systems are the product of past consolidations, some of which have yet to be fully consummated, and congressional policy continues to favor further such transactions. However, if the component parts, and their respective work forces, cannot in fact be consolidated insofar as inconsistent with a collective bargaining agreement, unless and until such agreement is changed in accordance with the RLA, a true consolidation will be impracticable if not impossible.

It is still generally true, as it was when *United States* v. *Lowden*, 308 U.S. 225 (1939), was decided, that the

seniority rights of railroad employees "are restricted in their operation to those members of groups who are employed at specific points or divisions." *Id.* at 233. An employee can neither exercise seniority to transfer to another seniority district nor be reassigned thereto by the carrier. If an employee voluntarily accepts employment in another seniority district, his seniority therein dates from that time so that he commences at the bottom of the seniority roster.[3]

The significance of this in a merger situation perhaps can best be illustrated by a hypothetical example. Assume that an operation on component A utilizing 50 employees is consolidated into a like operation on component B utilizing 100 employees, and that the consolidated operation requires 125 employees at the outset. If the seniority rules can be overridden, an implementing agreement or award determines how the 125 active employees from the 150-man combined workforce are selected and their seniority rights accommodated; the other 25 are furloughed, until recalled to work because of increasing business or attrition of more senior employees, and paid their guaranteed compensation for up to six years. If those rules cannot be overridden, it is unlikely that the 50 employees at A will accept an offer to work at B. If they remain at A, they will be entitled to guaranteed compensation for six years without working, and they would have bottom seniority if they move to B. In short, instead of working 125 experienced employees and paying a protective allowance to no more than 25, the carrier might have to hire 25 new employees to work with the 100 already employed at B and pay the protective allowance to all 50 that worked at A for up to six years.

Thus, if the seniority rules cannot be overridden, an actual consolidation could well mean that the carrier

[3] See, *e.g.*, *Seniority Practices—Railroad Operating Employees and Other Industries*, App. Vol. III to Report of the Presidential Railroad Commission (1962) at 227, 230-235.



for years would pay a significantly greater number of employees (many of whom would not be working) than if such consolidation is not effectuated, while utilizing a less experienced work force. Moreover, collective bargaining agreements often include scope rules or other provisions that the unions contend prevent a transfer of work from one component of the system to another. Such a contention was upheld by the arbitrator in the CSX proceedings involved in these cases, which could have barred the transfer of any work unless, as the arbitrator determined with the approval of the ICC, the implementing award overrides that limitation.[4]

If implementations of approved consolidations must be delayed until the unions agree in bargaining under the RLA, or the carriers have exhausted the "major dispute" procedures governing such bargaining, the unions could substantially delay and as a practical matter likely could prevent such implementations at any time. As this Court has observed, those procedures are notoriously "long and drawn out" and "almost interminable."[5] In

[4] In view of that ruling, the ICC did not reach the issue of whether the arbitrator's interpretation of the agreement was erroneous as the carrier contends. *See* 4 I.C.C.2d at 647, 649-650.

[5] *Railway Clerks* v. *Florida E.C. R. Co.*, 384 U.S. 238, 246 (1966); *Shore Line* v. *Transportation Union*, 396 U.S. 142, 149 (1969). See, also, *Burlington Northern* v. *Maintenance Employes*, 481 U.S. 429, 444 (1987) ("virtually endless"). The major dispute procedures are succinctly outlined, in *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969), as follows: "A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the service of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of

the NRLC's experience, they often require two or more years to exhaust. And if exhausted without an agreement, the unions can resort to primary strikes and to secondary picketing extending to the carriers nationwide.[6] Hence, the NRLC urges this Court to reverse the decision below. Otherwise, the efficiencies and economies that Congress anticipates from railroad consolidations seldom could be realized in fact.

## SUMMARY OF ARGUMENT

In holding that the exemption from "all other law" is inapplicable to railroad collective bargaining agreements, without considering whether that exemption is applicable to the RLA, the Court of Appeals misconceived the relationships between such agreements and the RLA. The agreements are made and enforced under the RLA to which the plain terms of the exemption apply even if, as the court below erroneously concluded, it is not applicable to common-law obligations.

## ARGUMENT

The Court of Appeals considered railroad collective bargaining agreements to be enforceable under the common law, and concluded that the exemption in § 11341(a) of the ICA from "all other law" does not extend to such common-law obligations. It held that the exemption does not provide a basis for overriding a labor agreement that would impede an implementation of a consolidation approved by the ICC under § 11343 without deciding whether that exemption may be applicable to the RLA.

---

essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10."

[6] See, *e.g.*, *Burlington Northern* v. *Maintenance Employes*, *supra*, 481 U.S. at 450-453; *Railway Trainmen* v. *Terminal Co.*, *supra*, 394 U.S. at 378-379, 384-385.



That approach reflects a radical misconception of the relationships between railroad labor agreements and the RLA. The holding that the § 11341(a) exemption is limited to statutory law is clearly erroneous in our opinion,[7] but that error essentially is irrelevant by reason of the Court's even more astonishing error in concluding that railroad labor agreements are enforceable under common law. Those agreements are bargained, construed and enforced under the RLA.[8] That is what the RLA is all about. But for the RLA, the railroads could terminate such agreements at will including any obligations thereunder that might impede implementation of a transaction approved by the ICC.[9] And, the RLA undoubtedly is a

---

[7] The common law is "law" within any ordinary meaning of that term just as much as is statutory law. See, *e.g.*, *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 78-80 (1938). Moreover, it simply is not believable that the Congress intended, for example, to prevent statutes enacted by State legislatures from impeding the implementation of approved transactions but to permit State courts to achieve the same result through application of their common law doctrines. We note that, when enacted in 1920, the first predecessor of § 11341(a) also expressly applied to the antitrust laws. That was only nine years after the well-known decisions construing the Sherman Act as incorporating the "rule of reason" developed in the common law respecting unreasonable restraints of trade. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 50-62 (1911); *United States* v. *American Tobacco Co.*, 221 U.S. 106, 178-180 (1911). See *California* v. *American Stores Company*, 58 U.S.L.W. 4529, 4532-4533 (1990), regarding the controversy that arose out of those "most famous" decisions. Surely, the Congress did not intend to permit approved transactions to be subjected to common law rules of liability as unreasonable restraints of trade.

[8] Among many possible citations, even if limited to decisions by this Court, see, *e.g.*, *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972); *Shore Line* v. *Transportation Union*, *supra*, 396 U.S. at 156; *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 722-728 (1945), on rehearing, 327 U.S. 661 (1946).

[9] "Another among the railroad industry practices which influenced the provisions of the Railway Labor Act was that of negotiating open-end collective bargaining agreements. Railroad agreements do not expire on a given date but remain in effect until one party or

"law" to which the § 11341(a) exemption on its face applies.

Thus, the issue of whether the § 11341(a) exemption affords a basis for obviating obstacles posed by labor agreements to a carrier's implementation of a transaction approved by the ICC is subsumed within the issue of whether that exemption applies to the RLA. The "paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms of an enactment of Congress. See *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225, 232." *Teamsters Union* v. *Oliver*, 358 U.S. 283, 296-297 (1959). See also, *e.g.*, *California* v. *Taylor*, 353 U.S. 553, 561 (1957).[10] *Cf.*, *Schwabacher* v. *United States*,

---

the other proposes modification of certain of the agreement's provisions, whereupon negotiations take place on the specific issues raised and, when agreement is reached, the contract is modified accordingly. The earliest railroad agreements known, dating back to the last quarter of the 19th Century, were of this open-ended type and the practice continues throughout the industry to the present time." Burgoon, *Mediation under the Railway Labor Act*, included in *The Railway Labor Act at Fifty* (GPO, 1977), at 71, 72. Under the common law, such open-ended agreements would be terminable at will by either party. See, *e.g.*, *Hodge* v. *Evans Financial Corp.*, 707 F.2d 1566, 1568 (D.C. Cir. 1983); *Martin* v. *Equitable Life Assur. Soc. of U.S.*, 553 F.2d 573, 574 (8th Cir. 1977); 17A C.J.S., Contracts, § 398, p. 478.

[10] The Court of Appeals previously had recognized that application of the § 11341(a) exemption to alleged rights under a collective bargaining agreement turned upon whether the exemption is applicable to the RLA. In *Brotherhood of Locomotive Engineers* v. *I.C.C.*, 761 F.2d 714 (D.C. Cir. 1985), the ICC had relied upon that exemption in rejecting a union contention that the Commission's approval of a "consolidation . . . did not alter previous labor arrangements" between the unions and carrier parties to that transaction. 761 F.2d at 719. Although concluding that the exemption could apply to the RLA (and thus to alleged contractual rights under that statute) in appropriate circumstances (see 761 F.2d at 722-724), the Court of Appeals disagreed with the ICC's view that the exemption is self-executing and remanded the case for an explanation of why



334 U.S. 182, 199-202 (1948), where the Court held that the predecessor of § 11341(a) exempted the carrier parties to an approved transaction from contractual obligations enforceable under State law inconsistent with implementation of that transaction.

The exemption from "all other law" hardly could be phrased more broadly and there can be no doubt that the RLA on its face is an "other law." As this Court once again reiterated in *Kaiser Aluminum & Chemical Corporation* v. *Bonjorno*, 58 U.S.L.W. 4421, 4423 (1990):

> "The starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'"

The Congress has not expressed an intent to exclude the RLA from the scope of the exemption plainly expressed in § 11341(a). Hence, as the lower courts consistently have recognized, that exemption is applicable in appropriate circumstances to the RLA.[11] Hence, it also is ap-

---

application of the exemption so as to terminate the unions' "asserted right to participate in crew selection is necessary . . . ." 761 F.2d at 725; generally, at 724-725). This Court reversed essentially on the ground that the unions had not raised their contentions before the ICC in a timely manner. *ICC* v. *Locomotive Engineers*, 482 U.S. 270 (1987). In a concurring opinion by Justice Stevens, four members of the Court agreed with the "ICC's argument that § 11341 is self-executing and that the Commission need not make any explicit necessity findings" (482 U.S. at 297), and thus would have reversed the Court of Appeals for that reason.

[11] In addition to the case discussed in n.10 above, see, *e.g.*, *Broth. of Loco. Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794, 799-801 (1st Cir. 1986), *cert. denied*, 479 U.S. 829 (1986); *Missouri Pacific R. Co.* v. *United Transp. Union*, 782 F.2d 107, 111 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987); *Burlington Northern, Inc.* v. *American Ry. Super. Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975); *Bundy* v. *Penn Central Co.*, 455 F.2d 277, 279-280 (6th Cir. 1972); *Nemitz* v. *Norfolk and Western Railway Co.*, 436 F.2d 841, 845 (6th Cir. 1971); *aff'd*, 404 U.S. 37

plicable to collective bargaining agreements enforceable under the RLA insofar as they would impede the carrying out of a transaction approved by the ICC. The court of appeals erred in holding to the contrary.[12]

---

(1971); *Brotherhood of Loc. Eng.* v. *Chicago & North Western Ry. Co.*, 314 F.2d 424, 432 (8th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963); *Texas & N.O. Ry.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151, 161-162 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963); *Ry. Labor Executives* v. *Guilford Transp. Indus.*, 667 F. Supp. 29, 35 (D. Me. 1987), *aff'd* (table), 843 F.2d 1383 (1st Cir. 1988), *cert. denied*, 57 U.S.L.W. 3839 (1989).

[12] Assuming that it otherwise is applicable, the exemption from "all other law" applies insofar "as necessary to let" a participant in a transaction approved by the ICC "carry out the transaction . . . ." Thus, that "as necessary" requirement is not applicable to the transaction itself, but to the carrying out of the transaction in a manner that comes within the scope of the ICC's approval. See *ICC* v. *Locomotive Engineers*, *supra*, 482 U.S. at 298 (concurring opinion). Since the ICC held that the implementations proposed by the carriers in these cases do come within the scope of its approvals, and authorized certain transfers of work and employees in connection therewith, the only issue under the "as necessary" requirement is whether the RLA or agreements thereunder would impede the carriers from carrying out those rulings by the ICC if not exempted under § 11341(a). If the carriers otherwise would have to comply with requirements of the RLA before transferring such work or employees, then the exemption is "necessary" and is applicable to relieve the carriers of such requirements and from any inconsistent provisions of agreements under the RLA.



## CONCLUSION

The decision by the Court of Appeals should be reversed.

Respectfully submitted,

RICHARD T. CONWAY
(Counsel of Record)
RALPH J. MOORE, JR.
D. EUGENIA LANGAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
Vice Chairman and
General Counsel
National Railway
Labor Conference
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7200

*Attorneys for the National Railway Labor Conference as Amicus Curiae*

May 25, 1990